LOWER BURMA RULINGS

BEING THE

PRINTED JUDGMENTS

OF THE

CHIEF COURT OF LOWER BURMA

VOLUME VI

1911—1912

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DURING

1911-12.

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PUISNE JUDGES.

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LOWER BURMA RULINGS, VOLUME VI.

TABLE OF CASES.

M—concld.

N

O

P

R

S

T

V

W

Y

LOWER BURMA RULINGS, VOLUME VI.

TABLE OF CASES CITED.

M—concld.

N

O

P

Q

R

R—*concld.*

S

T

U

V

W

Z

LOWER BURMA RULINGS.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

Civil 1st Appeal No. 63 of 1908.

GEORGE GILLESPIE & Co., LTD. *v.* {1. MAUNG MAUNG. 2. MA MYA.

August 23rd, 1909.

Higinbotham—for appellaant (plaintiff).

Rutledge—for respondents (defendants).

Meaning of words "opposed to public policy"—Contract Act, 1872, s. 23.

The plaintiff company entered into an agreement with the first defendant, an Inspector of Land Records, under which the latter was to buy land for the company in the circle in which he was employed, and was to receive remuneration from the company for his services, but all transactions were to be carried out in the name of the second defendant. The first defendant bought lands in the name of the second defendant. The company provided the funds to pay for the lands, and paid the first defendant remuneration. Conveyances of the lands were executed by the sellers to the second defendant. The defendants having refused to convey the lands to the company, the latter brought a suit to compel specific performance of its contract with the first defendant. The original Court refused a decree for specific performance on the ground that a contract of employment of an Inspector of Land Records as agent to purchase and sell lands within his circle at a large fee was a contract opposed to public policy and consequently should not be enforced by the Court.

Held,—that the company was entitled to specific performance of the contract. The words "opposed to public policy" in section 23 of of the Contract Act do not leave at large to each Court to find that a particular contract is against public policy, and a Court cannot invent a new head of public policy. The dereliction of duty on the part of the first defendant as a Government servant, not being contrary to law or something having the force of law, did not afford ground for holding that the contract between him and the company was void as being opposed to public policy.

Janson v. *Driefontein Consolidated Mines, Ltd.*, (1902) L.R., A.C., 484 ; *Egerton* v. *Earl Brownlow*, (1853) 4 H.L.C., I ; referred to.

Fox, C.J.—There can be no doubt that the District Judge's findings on the facts are correct. The plaintiff company wanting land in the neighbourhood of Bassein for the purposes of a rice-mill sent a manager there to enquire and try to get some. He went to the Land Records office and there met the first defendant, who was the Inspector of Land Records for that part of the country. The latter offered to assist in getting land for the company, and it was agreed between him and the manager that he was to buy land for the company, the latter remunerating him for his services, but that transfers were to be taken in the name of the second defendant who is his sister-in-law. The object of this last stipulation is manifest.

1909.

GEORGE GILLESPIE & CO., LTD. v. MG. MAUNG.

Lands, including the land which is the subject-matter of the suit, were purchased by the first defendant and transferred to the secod defendant as contemplated by the agreement. The plaintiff company provided the purchase-money and paid the remuneration to the first defendant, everythtng however being carried out in the name of the second defendant, as if she were the real purchaser and agent of the plaintiff company. Subsequently, she nominally, but the first defendant really, refused to transfer the land in suit to the company. The latter brought this suit to compel specific performance of the contract. The District Judge found in favour of the company on the facts, but declined to enforce the contract on the ground that a contract of employment at a large fee of an Inspector of Land Records as an agent to purchase and sell revenue-paying paddy land within his circle was, in his opinion, a contract opposed to public policy which should therefore not be enforced.

In the words of Lord Davey in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1), "public policy is always an unsafe and treacherous ground for legal decision." In the same case Lord Lindley says :

> A contract or other transaction which is against public policy, *i.e.*, the general interest of this country, is illegal ; but public policy is a very unstable and dangerous foundation on which to build until made safe by decision.

The Lord Chancellor quoted with approval the following passage from the judgment of Baron Parke in *Egerton* v. *Earl Brownlow* (2) :

> It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provided for it by proper enactments. It is the province of the judge to expound the law only ; the written from the statutes : the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference ; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good ; for instance, the illegality of convenants in restraint of marriage or trade. They have become part of the recognised law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.

The Lord Chancellor himself said, amongst other things :—

> I do not think that the phrase against "public policy" is one which in a Court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy * * * *
> In treating of various branches of the law learned persons have analysed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy ; but I deny that any Court can invent a new head of public policy.

(1) (1902) L.R., A.C., 484. (2) (1853) 4 H.L. Cases, I.

1909.

GEORGE GILLESPIE & Co., LTD. v. MG. MAUNG.

In the present case the District Judge has practically done this. Whatever one may think of the moral standard of a person who employs the servant of another to do work for him without first obtaining the permission of the servant's employer, it is going very far to say that when the servant has done the work partially, and has acquired benefits and remuneration under it, the Court will not compel him to complete the work, because it would be against public that a contract for services between a servant and any one except his master should be enforced.

The District Judge laid special stress upon the fact that in the present case the servant was a servant of the Government and an Inspector of Land Records, and that the contract was to purchase lands in the circle in which he exercised his functions. No doubt it was highly improper of the first defendant to enter into such a contract, and it is difficult to believe that the plaintiff company's manager could have thought that it was justifiable for a man in the first defendant's position to engage in buying and selling land for remuneration. Both parties must have known that if the first defendant's superior officers became aware of his doing this, he would be dismissed from Government service. Nevertheless, it would be inventing a new head of public policy as a ground for refusing to give effect to contracts if the dereliction of duty on the part of the first defendant was not a thing contrary to law or something having the force of law. It has not been contended that there is any positive law which forbids a Government servant in the position of the first defendant from buying and selling land either in his circle or elsewhere.

In my opinion, the District Judge's ground for refusing to grant the plaintiff company a decree, cannot be supported.

If the case is considered as between the plaintiff company and the second defendant, that is to say, if the contract is looked upon as really between the company and her, no question of public policy arises. By the written agreement she agreed to sell to the company's agent the land which she declared she bought as an agent of the company.

In my judgment the decree of the District Court must be reversed, and a decree passed against the defendants in terms of the prayer of the plaint, and ordering them to pay the plaintiff company their costs of the suit and of this appeal.

In view of the evidence in the case establishing clearly that the first defendant was the real purchaser of the land, and that the second defendant merely her name, and has been throughout a mere benamidar for the first defendant, I think that the plaintiff company is entitled to a conveyance deed executed by, or by the Court on behalf of, both the defendants under Rule 34 of Order XXI of the Code of Civil Procedure.

Parlett, J.—I concur.

Criminal Appeals No. 604 and 605 of 1910.

Nov. 7th, 1910.

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, and Mr. Justice Twomey.

1. PO CHIT
2. THET PO } *v.* KING-EMPEROR.

H. A. Nicol—for appellants.

Rutledge, for the Government Advocate—for King-Emperor.

Accomplice—Evidence of if uncorroborated—Tests essential before being accepted—If considered true, a conviction, based thereon, not illegal—Indian Evidence Act, 1872, ss. 114, 133.

In a case of kidnapping followed by murder, the uncorroborated evidence of an accomplice, whose share in the crime was almost as bad as that of any of those who took part in it, was the only evidence against those implicated in the crime.

It was held that while the terms of section 133 of the Indian Evidence Act suggest that a conviation based upon evidence of the kind referred to is to be regarded as exceptional, and the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, the Court must carefully test the truth of the uncorroborated evidence of an accomplice and must search for the motives which have prompted the accomplice to say what he has said and for the circumstances which led up to his disclosures. The evidence must be subjected to the most rigid tests in the endeavour to ascertain the true facts. If after doing this the Court is satisfied that the accomplice has spoken the truth, the accused should be convicted of the crime.

Fox, C.J.—Maung Po, the twelve-year-old son of Maung Nyein andMa Shwe Ket, disappeared on the evening of the 11th May 1910. His father saw him last when he was going from his house in the direction of houses in one of which the boy's cousin, Po Man,lived. The father thought the boy was going to the house of a relation where he was in the habit of going. The boy did not return and search was made for him that night without avail. The parents' suspicions that the boy had been kidnapped, and would be kept until ransom was paid for him, were soon aroused. Both of them were distracted with fear lest the boy should be murdered, and were evidently ready to pay all they had, and say nothing to the authorities rather than lose their son. No report of any kind was made to the police until seven days after the disappearance of the boy. On the morning of the 12th May Maung Nyein says he questioned his nephew, Po Man, about the boy, but he said he knew nothing. Maung Nyein says that later on Aung Nyun told him that Po Man, Thet Po, Po Chit and Po Tan had kidnapped the boy, and that if money was paid he would be returned. Aung Nyun said he knew this because the above four men had consulted in his presence about kidnapping the boy, and he had been promised Rs. 100 if he would join them.

On the 13th May one of Maung Nyein's daugthers brought him a letter which she had found in front of the house. The letter is not signed. It advised the person for whom it was intended not to make a report at the police station as the boy would bekilled if a report was made. It appointed a place to

1910.

PO CHIT v. KING-EMPEROR.

which one man alone should come at night bringing Rs. 1,500 and threatened that if the money was not brought, or if many people came with it, the boy would be killed and his head hung on the village gate. On the afternoon of the same day Thet Po came to Maung Nyein and asked what the amount mentioned in the letter was. On being told he asked how much money Maung Nyein had. Maung Nyein replied he had Rs. 400, whereon Thet Po said the boy could not be given back for that amount, and it must be made up to Rs. 500.

On that night Maung Nyein went with a friend to the place mentioned in the letter, but no one appeared.

On the following morning Thet Po came to him again and asked how things had gone. Maung Nyein asked him why no one had appeared the previous night, and Thet Po replied that "they" had not yet settled things. Maung Nyein then said he thought the boy was no longer alive, to which Thet Po replied that he was alive.

On the 17th May another anonymous letter was brought to Maung Nyein by a relation who had found it. This letter began by stating that the reason why the authors of it had not shown themselves when Maung Nyein went to the place appointed in the previous letter was because many people had gone with him. It went on to give warning that if many persons came next time the boy would be killed, and it gave directions as to what the two persons who might come should wear. They were to bring Rs. 700 to a named pagoda at sunset and wait there until 9 o'clock

Maung Nyein went to the place with two others and waited there until after midnight, but again no one came.

Next day his nephew Po Man's brother-in-law, Chit U, came and called him to a straw heap at the back of the witness house. Here he found Po Man. He asked Po Man where the child was, and Po Man's reply was that Thet Po had taken him away and had given him up to two men whose names he did not know. Po Man then said that Thet Po would murder him, and he could not wait any longer, but must go and give information at the police station. Maung Nyein went with him to the station, where he gave information of the loss of his son, the receipt of the letters, his having gone to the places appointed in them. He also said that on 6th increase *Nayon* (13th May) Po Man had told him that he (Po Man), had seen Thet Po abduct the boy. He said nothing about his interviews with Thet Po and Aung Nyun. He even said that Thet Po had not been asked anything about the matter as yet.

The Sessions Judge remarks that Maung Nyein appeared to be in a distracted and distraught frame of mind over the loss of his son even when he was giving evidence on the 30th August, and in view of the contradictory statements he had made about his interviews with Thet Po, he could not take Maung Nyein's evidence as to these into serious consideration as against Thet Po.

1910.

PO CHIT v. KING-EMPEROR.

The evidence of Maung Kôk, who is Maung Nyein's brother-in-law and who supported him as to the interviews with Thet Po, the learned Judge rejected as entirely false. The boy's mother, Ma Shwe Ket, had been even more distraught than Maung Nyein. She sent off people to consult a soothsayer, and she says that the witness, Maung Pyan, came to their house on the night of the 12th May and said that Po Man, Po Tan and Po Chit were the people who took away her son. She had previously learnt from one of the women who went to consult the soothsayer that on the way Po Pyan had asked if she (Ma Shwe Ket) suspected any one, and on being told that she suspected Po Tan, Po Chit and Po Man, he said he suspected them also, and they were certainly in it.

Ma Shwe Ket said she asked Po Pyan why he had not told her when he knew about the child, and he said, "It was fated to happen, and I forgot to mention about it."

One of the women deputies to the soothsayer and Po Pyan himself gave somewhat different versions of what Po Pyan had said, and of the time and occasion on which he said anything. According to Ma To Do, Po Pyan said to her on the way to the soothsayer that he thought Po Man and Po Chit were in the kidnapping, as he had seen them going about together, and he also said that he had intended to inform Ma Shwe Ket, but having been busy he had not been able to do so.

The information to the police on the 18th May had no result in discovering anything about what had happened to the boy. The police officer to whom the information was given appears to have done little or nothing: possibly this was because Maung Nyein and others were living in hope that the boy would be returned, and did not wish the police to do anything which might delay the return or bring about the death of the boy. Po Man was questioned by the police, but on the first occasion he said he knew nothing. On the 25th May, however, he told the Sub-Inspector, who had returned from investigating another kidnapping case, the story of the kidnapping of Maung Po and showed him where the body of the child was. He was taken on the same day to a magistrate to whom he made a confession which in essentials gives the same story as he gave in evidence after pardon had been tendered to him. The story is a gruesome one, and affords an illustration of the low moral standard of some of the bad people amongst the rural population, and of the cruelty they can be capable of.

The people implicated by Po Man are himself, a young man of 20 years of age, Po Chit, a boy of 15 years, Thet Po, a man of 37 years, and Po Tan, a man of 24 years. According to his evidence he came across the other three one day about a fortnight before the kidnapping. Thet Po then told him that if he would "catch" his cousin, he would give him Rs. 100. Po Man agreed to do so if he could manage it. Aung Nyun came up to them. Thet Po asked him to join in the scheme, and Aung Nyun was not averse. Thet Po finally remarked that five persons had heard

what had been said, and that if any of them said anything about it, he would kill him. It may be noted here that in his confession on the 25th May Po Man said nothing about this meeting and conversation. It may be that on that occasion it did not come to his mind, or he may have thought it of little or no importance. On the other hand, it may be an after-concoction the object of which was to show corroboration, Aung Nyun being also got to speak to the same meeting. The next occurrence which Po Man spoke to was a meeting of himself and the three accused on the 9th May. This came about, according to his story, in consequence of Po Chit coming to him and saying that Thet Po wanted to see him. He went to where he was told Thet Po was, and found him and Po Tan there. Po Thet again asked him to "get" Maung Nyein's child or children and promised to pay him for doing so. Again on the 10th May Thet Po came to him and asked him to get the boy, and to bring him on the night of the following day to a place he named.

On the 11th May Po Chit came to his house about 7 o'clock in the evening with a query from Thet Po as to why the boy had not been brought. Po Chit went away and immediately afterwards the small boy, Maung Po, came along. Po Man asked him to come for a walk with him, and the boy followed him. When they got to where the three accused were, Po Chit and Po Tan took him by the hands, and went on. The poor boy apparently did not suspect they had any evil designs against him, for he went along apparently voluntarily. After leaving the village the party halted, and Po Chit was told by Thet Po to take the child away out of hearing. When they had gone Thet Po said to Po Man and Po Chit that the boy knew them, and if he were sent back to his parents they would all go to jail, so the child must be killed, and money demanded from the parents as if he were alive. Po Man says that this proposal sickened him at first, but when he thought of the possible seven years in jail "he said nothing." Thet Po said that he (Po Man) must kill the child, but this Po Man said he dare not do. Thet Po threatened him, but eventually Po Tan said that he and Po Chit would kill the boy. Po Tan also asked Thet Po for directions as to where the letter demanding ransom for the boy should be put, and Thet Po told him that Rs. 1,500 should be demanded and that the letter should be put in a certain place. No letter was afterwards found in that place. Thet Po having given his directions left the others and went back towards the village saying "Do your work." Po Tan and Po Man then went to where Po Chit and the boy were, and all started off again, the boy being told that they were going to the night bazaar in Zigôn. They came to a gravel pit, and the boy sat down. A few words passed beween the three intent on murder, and then Po Chit hit the child on the head with an iron bar which he had been carrying all along. The boy fell over and Po Chit hit him another blow on the head. Then Po Chit took a knife from his waist, and handed it to Po Tan, who took it and cut the child in the throat, and stabbed into his back.

1910.

PO CHIT v. KING-EMPEROR.

Po Man was during this sitting on the edge of the pit. After the killing of the child, Po Man went off to get a mamootie with which to cover up the chid's body with sand. This was done and all three went back to their houses promising each other not to tell any one of what had happened. Next morning he met Thet Po, who again threatened to kill him if he disclosed anything. On the same day he saw Po Chit and Po Tan, and the latter was writing an anonymous letter on a page from a copy book. The letters subsequently found were on paper which looks as if it had been taken from an ordinary school copy book. A few days afterwarks Maung Nyein and his brother told Po Man they suspected him of having made over the child to Thet Po, but he said he knew nothing about the matter. He denies that he told Maung Nyein that Thet Po had taken away the child and had given it to two unknown persons. He says that on several occasions he felt inclined to speak out, but was tongue-tied. At last, on the Sub-Inspector examining him, he told him everything and went and showed him the place where the boy's body had been buried.

The reason for confessing which he gave to the magistrate who recorded his confession was in effect that he was overcome with remorse for what he had done, and that as he had been a party to the murder of his cousin he did not care if he also lost his own life and were hanged.

At the end of his evidence in the Sessions Court he said that two days previous to the murder Thet Po had asked him to ask one Po Pyan if he would join in the scheme, and he had done so. Po Pyan was willing if the men concerned were reliable. He had said nothing about this incident in his confession, and his story as to it stands on the same footing as the story about Aung Nyun having been asked to join in the scheme.

Po Man was, on his own story, undoubtedly an accomplice in the crimes which ended in the murder of the child Maung Po. The only corroboration of any part of his story beyond the finding of the child's body in the place pointed out by him, and the body having wounds such as the blows he said were given would cause, come from Aung Nyun and Po Pyan.

Aung Nyun said that on the 5th or 6th May he came upon the three accused and Po Man and there was the talk about kidnapping Maung Nyein's son. He also said that he and Thet Po had been about drinking together on the afternoon of the 11th May, and that Thet Po told him the kidnapping plan would come off that day, and he gave him Rs. 10 as hush-money. Aung Nyun was, on his own showing, a good-for-nothing scoundrel, whose word was *primâ facie* entitled to no credit. Po Pyan gave evidence about Po Man having spoken to him about joining in the plot, telling him that Thet Po, Po Chit' Po Tan and himself were the others in it. Po Pyan manifestly was also a scoundrel, otherwise it was not likely that he would have been asked to join in such a scheme.

Because these men corroborated Po Man in some statements, which were of comparatively little importance, the learned Judge convicted Thet Po and Po Chit, but finding no corroboration of Po Man as regards Po Tan, he acquitted him. In my opinion there was no corroboration of Po Man as to who, besides himself, took part in the crime by any reliable evidence, for Aung Nyun and Po Pyan were themselves witnesses who were *primâ facie* unworthy of credit, and their evidence should be looked on in practically the same light as Po Man's. The story of neither forces itself on one as being true ; on the contrary, each appears to be against rather than clothed with probability, and neither was heard of in the first stages of the investigation.

In my opinion, then, the convictions can only be sustained if Po Man's evidence is believed and acted on, although, on his own showing, his part in the crime was manifestly almost as bad as that of any of those who took part in it.

I proceed to consider the case from this point of view.

The evidence of accomplices has been the subject of numerous dicta of Judges in England and in India. Some of those of the India Courts are difficult to reconcile with others, and with the law as laid down by the India Legislature. The most prominent among them is the oft-repeated saying that it is unsafe to convict any one on the evidence of an accomplice unless the latter is corroborated in material particulars. This means, of course, corroboration by the evidence of reliable witnesses. The saying is no doubt true in a sense but, stated broadly and alone it is only a partial statement of the law on the subject and it is apt to be misleading. At the risk of adding to the somewhat confusing dicta on the subject, I consider it may be of use to examine what is the law as regards the evidence of accomplices which is binding on all Courts in India. The bed rock of the Indian law is section 133 of the Indian Evidence Act. This runs : " An accomplice shall be a competent witness against an accused person ; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." This is the only substantive law in India on the subject. Some of the decisions in the High Courts of India have whittled down the plain statement in the latter part of the section to such an extent as to convey the idea that it is really not the law. In support of the views put forward a long established practice of the Courts has been relied on, but a practice however old must give way before an express and unequivocal declaration of the Legislature.

The wording of the section, however, itself arouses thought. It was evidently intended to settle questions which were at the time thought to be unsettled, and the framers of the Act, who were without doubt well acquainted with all the decisions of the English and Indian Courts on the subject, put the wording of the section before the Legislature for adoption, and it was adopted as a definite statement of law to be followed in India.

1910.

PO CHIT
v.
KING-EMPEROR.

The first part of the section need not be dealt with. The wording of the second part, "and a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice," raises reflection as to how an accomplice's evidence should be treated, and under what conditions a conviction may rightly be based on it alone. It on its face suggests that a conviction on the uncorroborated evidence of an accomplice is to be regarded as exceptional.

The Legislature has afforded a guide as to how such evidence should be dealt with by giving as an illustration to section 114 of the Act, the maxim "the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars." Further on in the illustration part of the section occurs the following—"But the Court shall also have regard to such facts as the following in considering whether such maxims do or do not apply to the particular case before it." The illustrations referring to the maxim about an accomplice's evidence are—

"(1) A, a person of the highest character, is tried for causing a man's death by an act of negligence. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the carelessness of A and himself.

"(2) A crime is committed by several persons. A, B and C, three of the criminals are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable."

These cases are, of course, merely examples of circumstances under which the maxin given in illustration (*b*) should not be applied or should not prevail. The previous wording to which they are themselves illustrations shows clearly that the maxim is not to be regarded as an inflexible rule never to be departed from. If it were this latter, no person's life or liberty should ever be taken away on the evidence of an accomplice only ; to act on such a rule, however, would be running counter to the express provision in section 133 of the Evidence Act.

How then must the evidence of an accomplice be dealt with in order to give full effect to both the maxim and the rule in section 133 ?

It appears to me that the answer is that evidence of an accomplice must be regarded as *primâ facie* unsafe to convict any one on, unless it is corroborated in material particulars by the evidence of witnesses whose evidence can be relied on ; but, bearing in mind that a person may be convicted on the uncorroborated evidence of an accomplice, every endeavour must be made to test the truth of such evidence by the Judge who has to come to a decision on it, and, keeping before his mind the

possibility of the accomplice speaking falsely, he should, as far as possible, search for the motives which have prompted the accomplice to say what he had said, and for the circumstances which have led up to his disclosures, and give the evidence generally the most rigid test possible in his endeavour to ascertain the true facts. If, after a thorough test of the evidence, the Judge is satisfied that the accomplice has spoken the truth, and his evidence brings home a crime to an accused person, then the Judge should convict the accused of the crime.

The decision in each case must depend on its own particular circumstances, and no general rule can be laid down as to when an accomplice's uncorroborated evidence alone should be accepted and acted on against an accused.

Dealing in this way with the evidence of Po Man in this case, it appears to me that the only part of it which is open to doubt is that which the learned Sessions Judge looked upon as corroborated. I refer to the interview when Aung Nyunt is said to have been present, and to Po Man having asked Po Pyan if he would join in the scheme. Po Man said nothing about either of these circumstances in his confession on the 25th May. The police officer heard nothing about Aung Nyun and Po Pyan until three days after the finding of the body of Maung Po. It is not impossible that Po Man was induced to add to his first story by some one who knew the importance of getting some corroboration of him. The main part of his story was scarcely capable of corroboration unless one of the villagers was willing to implicate himself by owning to having seen the child taken away, and to having said nothing during all the search for him.

There can be no possible doubt that Po Man was one of those who took part in the crime. Through him alone the body of the child was discovered, and if he had not disclosed where it was, it might never have been discovered. There is no room for any idea of Po Man having been induced by the police or villagers to tell a tale which was not true in order to implicate some one or to throw light on what had become of the child. Horribly base as his story makes him out to be, it is a story of a Burmese young man of the lowest order yielding to an offer and prospect of obtaining what for him would have been a very large some of money. The offer was made and the temptation came from a man much older in years than himself. It must have been noticed by Judges who have had experience of crimes committed by Burmese young men how open to the influence of older criminals young criminals are, and how unheedingly they enter into crimes without really thinking at the time of what they are doing. The story contains no improbablity. The crime could scarcely have been committed by one person alone. The description of crime is unhappily too well known, and is usually engaged in by a number of persons. It is highly improbable that Po Man could have been induced to entice away and betray his little cousin by any one except persons belonging to his own village. Outsiders

1910.

PO CHIT v. KING-EMPEROR.

could scarcely have had sufficient opportunity to get at him in order to induce him to enter into such a plot. The description he gives of how the idea of murdering the child started appears to me to bear the impress of truth, as also does the description of how the three young Burmese were willing to carry out the order of their older leader. Po Man no doubt minimizes his part in the gruesome murder, for it could not have been solely due to fear of Thet Po that he went on with the other two knowing full well that his little relation was to be murdered. I can see no possible ground for the believing that he has implicated the wrong persons, or persons who did not take part in the crime, and after the closest scrutiny and consideration I can give to his evidence I believe his relation of the occurrences attending Maung Po's dead to be true. Some might think that the reason he gave for confessing, *viz.*, remorse for what he had done, was of very questionable reality, but in the case of a Burmese criminal it is not unnatural. We have had many cases before us in which Burmese who have in their unthinking way committed crimes have evidently been genuinely sorry for what they had done after they have thought about it afterwards, and have then got into a state of not caring what happened to them or what was done to them. The after-effect is not an unnatural one in very impulsive and uncalculating people.

Convinced as I am of the truth of Po Man's main story I would sustain the convictions on his evidence alone ; on it there can be no doubt that Po Chit took part in the murder of the child Maung Po, and that Thet Po instigated the murder, and it was committed in consequence of his instigation.

I would confirm the sentence of death on Thet Po, but I do not think that the Court is called on to confirm the sentence of death on Po Chit, a boy of fifteen years of age, although his conduct was so horrible. It is evident that Thet Po was the concoctor and prime mover in the crime, and led the younger ones into it.

I would alter the sentence on Po Chit to one of transportation for life.

Hartnoll, J.—I agree with the learned Chief Judge that, if the convictions are upheld, they must be on the uncorroborated evidence of the approver, Po Man. There is considerable doubt in my mind that Aung Nyun and Maung Pyan have told the truth. Also to my mind it is doubtful whether Maung Nyein had interviews with Thet Po which he deposes to. I also agree with the exposition of the law regarding the evidence of approvers which has been laid down by the learned Chief Judge. The one point for consideration to my mind is whether Po Man's evidence should be believed uncorroborated as it is. It appears that he did not speak out at once, and that he denied at first all knowledge of the matter. He was arrested on the 23rd May and did not first confess until the 25th May, and so he was in custody for some two days before he

1910.

PO CHIT v. KING-EMPEROR.

confessed. If Aung Nyun and Maung Pyan are giving false evidence, then he has given false evidence in introducing their names into his story. If he has given such false evidence, his veracity is in question. That he was implicated seems to be quite clear as he gave the information which led to the discovery of the body. There is no clear reason why he should have implicated men who were not concerned ; but he is evidently not a man of high character. Very probably his story is quite correct in its major essentials ; but I hesitate to accept it implicitly for the reasons which I have given above. I think that there is a reasonable doubt as to its being correct. He may possibly have given wrong names for reasons of his own.

I would therefore set aside the convictions and sentences on Thet Po and Po Chit, and direct that they be acquitted and set at liberty as far as this case is concerned.

Final Order.

Dec. 12th, 1910.

Twomey, J.—Read the judgments of the Chief Judge and Hartnoll, J., in Criminal Appeals Nos. 604 and 605 of 1910.

Judgment delivered under section 429 of the Code of Criminal Procedure.

The learned Judges composing the Court of Appeal in this case are not at variance as to the law relating to the evidence of accomplices. There is an initial presumption against such evidence, and the question on which a difference of opinion has arisen is whether the presumption should prevail in this particular case or whether in the circumstances disclosed in evidence the accomplice Po Man should be regarded as sufficiently worthy of credit to justify the Court in acting upon his statement in the absence of corroboration.

The circumstances which favour the view that Po Man is speaking the truth may be briefly recapitulated.

He showed where the body of the murdered boy, Maung Po, was hidden, and it was found with wounds such as Po Man had already described. It is therefore almost certain that Po Man was concerned in the murder and that the facts are fully known to him.

Anonymous letters received by the boy's family show that he was kidnapped for the purpose of extorting money from his parents, and it is common knowledge that in offences of this kind several persons are jointly engaged. There is therefore good reason to believe that Po Man was not the sole murderer.

The person whom he accuses as the contriver of the kidnapping plot and the director of the actual murder is Thet Po, the son of his mother's first cousin, and no adequate reason has been shown why Po Man should falsely implicate either Thet Po or the two younger men, Po Chit and Po Tan, who are said to have carried out Thet Po's behests.

1910.

PO CHIT
v.
KING-EMPEROR.

The police were informed of Maung Po's disappearance on the 18th May, and a Sub-Inspector named Maung Po Kyaw began the investigation. He received no information of any value up to the 25th May, when he handed over the case to another Sub-Inspector, Maung Man. There was a clue, for Po Man had already said enough to indicate that he had some knowledge of the facts. The new investigating officer's first step was to question Po Man, who then disclosed what he knew and pointed out to the police officers and a Magistrate the place where the murdered boy's body was buried in a sand pit. The three accused men were arrested and Po Man was also arrested and taken before a Magistrate, to whom he forthwith made a confession implicating himself as well as the three accused. It seems to me that there are strong grounds for regarding the disclosures of the 25th May as the outcome of genuine remorse on the part of Po Man. He may well be believed when he says that he brought Maung Po to Thet Po without any intention that the boy should be murdered. He says the suggestion that the boy should be killed at first turned him sick and that he yielded only when he had reflected on the heavy punishment that is usually awarded to kidnappers and when Thet Po threatened to kill him if he held back When he confessed to the Magistrate he said that he did not care if he was hanged and that he confessed out of "remorse for his young cousin" (*nyi* is used for cousin as well as brother). Touching the spontaneous character of the confession it is noteworthy that the Magistrate even transgressed the provisions of section 163 (2) of the Code of Criminal Procedure by cautioning Po Man that he would not be dealt with leniently on account of any confession he might make, but that on the contrary it would be used as evidence against him.

It was not till the 6th June that it was decided to tender a pardon to Po Man under section 337 of the Code of Criminal Procedure.

When examined as a witness he adhered to the main lines of the story told by him in his confession, but he introduced certain additional matter which agrees in a specious manner with the statements of two witness called by the prosecution to corroborate him. It has been held that these additions are not worthy of belief, and the learned Chief Judge suggests that they were introduced at the instigation of some person (probably a subordinate police officer) who knew the importance of having an accomplice's evidence corroborated in material particulars.

Mr. Justice Harnoll hesitates to accept the approver's uncorroborated evidence on the grounds that the approver did not speak out at once, that he denied at first all knowledge of the case and did not confess till he had been two days in police custody. The learned Judge also lays stress on the additional matter introduced by the approver in his evidence. He points out that if the witnesses Aung Nyun and Po Pyan have

given false evidence, as is probably the case, then the approver, Po Man, has also given false evidence in introducing their names.

The learned Judge was misled by the entry of 23rd May as the date of arrest on the form filled in by the Magistrate who took the confession of 25th May. It is clear from the evidence that Po Man had not been arrested when he pointed out where the body was hidden and that he confessed to the Magistrate on that same day, *i.e.*, the 25th May. I have further verified the facts as to Po Man's arrest by referring to the special diaries of the police investigation. It is evident, I think, that Po Man acted spontaneously in disclosing the corpse on the 25th May and in confessing on the same day.

It is true that Po Man had previously denied knowledge of the crime. But the fear inspired by the older man, Thet Po, and the fear of punishment would account sufficiently for this reticence. If remorse for his own part in the crime had not gradually overcome these fears, Po Man would not have disclosed the hiding place of the corpse. His doing so is in my opinion a substantial guarantee of his good faith in accusing Thet Po and the two others. There is no apparent reason why, having gone the length of bringing the corpse to light, he should shield the real murderers and give the names of innocent men instead, one of them being a cousin of his own.

As regards the additional matter introduced by Po Man when examined as a witness I think the conjecture of the learned Chief Judge is probably correct. It is true that in respect of this extraneous matter Po Man appears to have given false evidence and I also agree with the remark of my learned colleague, Hartnoll, J., that Po Man is evidently not a man of high character. He is a youth of 20 years who, by his own showing, lent himself to a plot to kidnap his young cousin in order to extort money from the boy's parents, and then reluctantly agreed to the murder of the boy so as to prevent detection. After confessing his part in this crime, he possibly agreed to make certain additions to his story with the sole object of rendering it more acceptable to the authorities. As touching his character this last offence was a mere peccadillo in comparison with the diabolical crime in which he had already partaken. But I do not think that the approver's evdience as to the actual murder can be rejected merely because his character is bad. A rule of that kind would render the provisions of section 133 of the Evidence Act altogether nugatory.

I agree with the learned Chief Judge in accepting Po Man's evidence so far as it agrees with his confession of 25th May. My belief is not founded on the accomplice's character, or general truthfulness. I accept his evidence solely because it is invested with a high degree of probability by the circumstances of the case and because no reason has been shown why he should falsely accuse the appellants.

1910.

PO CHIT v. KING-EMPEROR.

I would therefore dismiss the appeal of Thet Po and confirm the sentence of death passed upon him.

I agree that the sentence on the younger appellant, Po Chit, may properly be commuted to transportation for life.

I give judgment accordingly under section 429 of the Code of Criminal Procedure.

Civil 2nd Appeal No. 264 of 1910.

Feby. 16th, 1911.

Before Mr. Justice Hartnoll.

1. LU GALE
2. MIN DWE } *v.* MAUNG SEIN.

Agabeg—for appellants (defendants).

Buddhist Law: Inheritance—"Kanwin" or the "Marriage Portion"—Rule regarding disposal thereof.

The general rule under Budddist law regarding the disposal of property given as *Kanwin* to a bride at the time of the marriage ceremony and delivered into her possession, is that even if she dies childless in her parents' house, the husband is entitled to inherit such property as against his parents-in-law.

Hla Aung v. *Ma E*, 1 Chan Toon's L.C., 31, referred to.

In this case Maung Sein and one Ma Sein Me who is now deceased, were married. Some eight months after the marriage Ma Sein Me died in the house of her parents. Maung Sein now sues her parents to recover certain gold ornaments which he alleges were given to his wife at the marriage as a marriage portion (kanwin). The defence was that the ornaments were merely displayed for show and not given as 'kanwin,' and further that no delivery of possession was proved. Both the lower Courts have held against the parents-in-law on these points, and from a perusal of the judgments and after hearing Mr. Agabeg, I see no reason to doubt the correctness of the findings on these points. It seems clear that the ornaments were specifically given as 'kanwin' at the marriage, and that then they were kept in charge of the mother-in-law in a box, and that on two occasions they were taken and worn by the bride.

I concur in holding that the ornaments were given as 'kanwin' and reduced to the possession of Ma Sein Me.

One of the grounds of appeal was that to constitute a gift of 'kanwin' the property must be given by the parents of the bridegroom. This was not argued on the hearing of the appeal, and I know of no authority for holding that the parents of the bride could not make a gift of 'kanwin.'

It was further urged that even, if it were proved that the property was given as 'kanwin,' and that the gift was accompanied by delivery of possession, Maung Sein could not claim more than one half of the same, *vide Hla Aung* v. *Ma E* (1). This case does not seem to me to have any bearing on the present one, as it was not found that the property in dispute in it was given as

(1) 1 Chan Toon's L.C., 31.

1911.

LU GALE
v.
MG SEIN.

'kanwin'. The texts that deal with the question of the inheritance of 'kanwin' are contained in sections 320 to 323 of the Digest of Buddhist Law, Volume I, and I have studied and read them carefully. From a consideration of them there seems to be no doubt that the rule is that, where a gift of certain property has been given as 'kanwin' at the time of the marriage ceremony, and where such property has been delivered into the possession of the bride, even if the bride dies childless in her parents' house, the husband is entitled to inherit such property as against the parents-in-law. Wherever 'kanwin' is specifically mentioned, this is the rule laid down, and considering the texts as a whole, the weight of authority is in my opinion in favour of this view.

I accordingly dismiss this appeal.

Before Mr. Justice Hartnoll, Officiating Chief Judge, and Mr. Justice Twomey.

Civil 1st Appeal No. 76 of 1910.

May 26th, 1911.

V. P. GOVINDASAWMY PILLAY. } *v.* { K. V. K. KOOLAYAPPA ROWTHER

R. S. Dantra—for appellant (plaintiff).

N. M. Cowasjee—for respondent (defendant).

Evidence—unfavourable nature thereof of one witness insufficient by itself to justify dismissal of a suit if other witnesses can be produced.

A sued B to recover a certain sum of money in consequence of breach of contract. After the framing of issues the evidence of one of A's witnesses was taken on one of the issues and this evidence was unfavourable to A. Despite A's wish to adduce further evidence on this issue, the suit was dismissed.

Held,—that the mere fact that the evidence of one witness was unfavourable to A was not a good ground for the dismissal of the suit without examining the other witnesses whom A wished to produce.

Looloo Sing v. *Rajendur Lalia*, 8 W.R., 364; *Gopee Ojha* v. *Hur Gobind Singh*, 12 W.R., 229; *Jeswunt Sing-jee Ubby Sing-jee* v. *Jet Sing-jee Ubby Sing-jee*, 2 Moore's I.A., 424; *Shaik Ibrahim* v. *Shaik Suleman*, (1884) I.L.R. 9 Bom., 146; followed.

Hartnoll, Officiating Chief Judge.—The appellant brought a suit against respondent to recover a certain sum of money in consequence of breach of contract. In the course of the suit the appellant contended that under a contract to deliver 'China' or 'small' mills rice *either* the delivery of 'China' or 'small' mills rice, *or* the delivery of special big mills rice would be a good delivery. The respondent on the other hand contended that under such a contract the delivery of special big mills rice would not be a good delivery. An issue was fixed on the point, and while it was being tried one Menasi was examined. As the learned Judge considered that Menasi's evidence was unfavourable to the appellant he called on appellant's counsel to show cause why the suit should not be dismissed in consequence of it, whereupon counsel stated that he wished to call several other witnesses in

1911.

V.P. GOVINDASAWMY PILLAY v. K.V.K. KOOLAYAPPA ROWTHER.

support of his contention. The Judge then intimated that after Menasi's evidence he could not find in favour of appellant on the point. He then made further remarks on the distinction between small mills and special quality rice and dismissed the suit. I am unable to see that the appellant took up any inconsistent positions. His case was that under a contract to supply 'China' or 'small' mills rice special quality big mills rice would be a good delivery. The mere fact that Menasi's evidence was unfavourable to the appellant was not a good ground for the dismissal of the suit without examining the other witnesses which appellant wished to produce. In support of this opinion I would quote the cases of *Looloo Singh* v. *Rajendur Laha* (1), *Gopee Ojha* v. *Hur Gobind Singh* (2), *Jeswunt Singh-jee Ubby Sing-jee* v. *Jet Sing-jee Ubby Sing-jee* (3), and *Shaik Ibrahim* v. *Shaik Suleman* (4). I would remand the case back to the original side under Order 41, Rule 25, with the following instruction.

The trial of the second issue should be proceeded with, all witnesses produced by either side being examined, and a finding should be recorded on it. If that finding is in favour of the respondent, the proceedings should be returned to this Court for orders. If the finding is in favour of the appellant the remaining relevant issues should then be tried and findings on them recorded when the proceedings should be returned to this Court for orders.

Twomey, J.—I concur.

Privy Council.*

(On appeal from the Chief Court of Lower Burma.)

Civil 1st Appeal No. 39 of 1908.

Before Lord Atkinson, Lord Robson, Sir Arthur Wilson, and Mr. Ameer Ali.

MAUNG PE *v.* LÔN MA GALE.

Suit under Burmese Buddhist Law for divorce only—No bar to a subsequent suit for partition of property between the parties—Separation of the causes of action generally the convenient course in cases of this kind—Sections 42 and 43, Code of Civil Procedure, 1882, (Rules 1 and 2 of Order II of the Code of Civil Procedure, 1908).

A obtained a decree of divorce only in the Township Court against B under Burmese Buddhist Law. He then sued her in the District Court for a partition of property and obtained a decree. The Chief Court allowed the appeal against this decree and set it aside on the ground that section 43 of the Code of Civil Procedure, 1882, prevents suits for partition of property in consequence of divorce under Burmese Buddhist Law from being brought after a suit for divorce only unless permission to omit the claim for a partition of property was given by the Court before which the divorce suit was heard.

(1) 8 W.R., 364.
(2) 12 W.R., 229.
(3) 2 Moore's I.A., 424.
(4) (1884) I.L.R. 9 Bom., 146.

* Overrules *Lôn Ma Gale* v. *Maung Pe*, V L.B.R., 114.

1911.

MG. PE
v.
LÔN. MA
GALE.

May 9th 1911.

On appeal to the Privy Council it was held that sections 42 and 43 of the Code of Civil Procedure, 1882. (Rules 1 and 2 of Order II of the Code of Civil Procedure, 1908) were not intended to bar an action like the present. The cause of action for the divorce was the misconduct of the wife, but the cause of action for the partition was the divorce of the wife founded on that misconduct.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side.

The judgment of their Lordships of the Privy Council was delivered on the 9th May 1911 by—

Lord Robson.—This is an Appeal from a judgment of the Chief Courts of Lower Burma on its Appellate Side reversing a judgment in favour of the present Appellant, who was Plaintiff in the action, and directing that his suit be dismissed with costs. The Respondent did not appear on this Appeal.

The Appellant and Respondent were Burmese Buddhists, and up to the 6th June 1907 were husband and wife. Some time prior to that date the husband filed a suit against the Respondent for dissolution of the marriage.

The alleged ground of divorce was that the Respondent had, by sundry fraudulent devices, stolen certain jewels which were the property of the Appellant. The question as to whether or not this is an adequate ground for a divorce according to Burmese Buddhist Law has not been argued either in the Courts below or here, and their Lordships express no opinion upon it. It is sufficient to say that the divorce was granted, and its validity is not contested. The present dispute is concerned solely with the claim of the Appellant to have the property in which the spouses were interested distributed, or dealt with according to Burmese Buddhist Law.

The first point in dispute is whether the divorce was by mutual consent, or was granted on the fault of the wife. The husband filed his claim in January 1907. In it he set forth the Respondent's alleged offence and he prayed for his decree on that ground alone. The Respondent thereupon filed her defence denying the allegations as to her misconduct and asking that the suit be dismissed with costs. Witnesses were summoned, but on the day fixed for hearing the Respondent abandoned her defence and, although continuing to deny her guilt, consented to a divorce. Judgment was thereupon given on the 6th June 1907 for a decree "as prayed for."

Afterwards, in August 1907, the Appellant brought the present action for the recovery of his property which he alleged his divorced wife still fraudulently kept in her possessions and for a partition of their joint property. The shares to which the parties would be respectively entitled under the partition would vary according to whether the divorce had been granted on the ground of a matrimonial offence or had been arranged by consent, and the Respondent contended that under the circumstances above stated the divorce had been by consent and had not been granted by reason of her fault. The District Judge found in favour of

1911.

MG. PE
v.
LÔN MA
GALE.

the Appellant on this point, but the Chief Court have cast some doubt upon that finding, although in view of their decision on another point in the case, which is dealt with later on they did not think it necessary to discuss it fully Their Lordships, however, think it desirable to state that they agree with the Judgment of the District Judge on this point. Although the Respondent at the last moment abandoned her defence and consented to the decree, she certainly ought not to be put in the position of an innocent wife who has contracted for a divorce on an equal footing with her husband. If she had invited her husband to enter into such an agreement before he began his action he would have been at liberty to refuse and to have insisted upon a decree establishing her guilt, in order to determine the basis upon which the subsequent partition should take place, and he was certainly placed in no worse position by the fact that he was obliged to bring the action in order to secure relief. The proceedings at law disclose, not an agreement between husband and wife, but a claim by the husband on a specific ground to which he wife in effect submitted.

The ground on which the Chief Court set aside the decree of the District Judge in the present action was that the Appellant had no right to a partition of property unless he asked for it in the action for divorce.

There has been some conflict of decisions in the Burmese Courts upon this point, and the Chief Court held, on this Appeal, that the matter being one of procedure must be determined by the Civil Procedure Code, sections 42 and 43.

Those sections are aimed against a multiplicity of suits in respect of the same cause of action and, shortly stated, they enact that if a Plaintiff fails to sue for the whole of his claim or remedy in respect of a particular cause of action, he shall not afterwards sue in respect of the portion so omitted or relinquished.

It is to be observed that the objection founded upon these actions should have been treated as a preliminary point, but no notice of it was given by the Respondent in the present action either in her defence, or at the trial, or in the grounds of appeal as first delivered. Under these circumstances, their Lordships are of opinion that she was too late to raise the point in the Court of Appeal except upon terms which would have indemnified the Appellant for her omission to raise it at the proper time.

With regard, however, to the point itself, their Lordships are of opinion that sections 42 and 43 of the Civil Procedure Code were not intended to bar an action like the present. The cause of action for the divorce was the misconduct of the wife, but the cause of action for the partition was the divorce of the wife founded on that misconduct. The partition may no doubt be treated as relief consequential upon the divorce and therefore dealt with in the same suit, but the evidence is different and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can

1911.

MG. PE v. LON MA GALE.

properly arise. There is, therefore, not necessarily any hardship on the Defendant in severing the two matters. Indeed it may, and generally would, be the more convenient course finally to settle the question of the divorce and the misconduct before entering upon an enquiry as to partition which would be altogether unnecessary if the decree were refused, or would be put on a different basis if the misconduct were disproved. If the Court should be of opinion that a petitioner has unnecessarily severed his claim for a partition from his claim for a divorce it may, of course, punish the Plaintiff by the exercise of its discretion as to costs, but their Lordships are of opinion that such a severance does not come within the mischief aimed at by sections 42 and 43 of the Civil Procedure Code so as to bar the claim to a partition which may be founded on the decree for divorce itself.

Their Lordships will therefore humbly advise His Majesty that this Appeal ought to be allowed, the Decree of the Chief Court set aside, and that of the District Court restored, with costs in both Courts.

The Respondent will pay the costs of the Appeal.

Privy Council.

(On appeal from the Chief Court of Lower Burma.)

Before Lord Macnaghten, Lord Robson, Sir Arthur Wilson, and Mr. Ameer Ali.

Civil Miscellaneous Appeal No. 77 of 1907.

S. R. M. M. RAMAN CHETTY *v.* MESSRS. STEEL BROTHERS AND COMPANY, LIMITED.

Mortgagees—Priority of—No claim to be based thereon if a mortgagee who executed a mortgage previous to another mortgagee assents to the mortgage executed in favour of the latter.

In an appeal to the Privy Council against the judgment published on page 8 of Volume V of the Lower Burma Rulings, their Lordships held that X could not claim priority in respect of his own mortgage subsisting from an earlier date than that on which a mortgage had been executed in favour of Z when X had been an assenting party to the latter mortgage or charge, which contained an express covenant that the property mortgaged was free from encumbrances, and when X had actually received a large portion of the mortgage money thus raised.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side.

May 18th, 1911.

The judgment of their Lordships of the Privy Council was delivered on the 18th May 1911 by—

Sir Arthur Wilson.—This Appeal arises out of conflicting claims set up by the respective parties in insolvency proceedings, which took place in the Chief Court of Lower Burma. The subject-matter of the Appeal is the sale-proceeds of a steam launch and a number of cargo boats which had been the property of the insolvent Maung Gvi, and which were sold in the course of realising the estate of the insolvent.

1911.

S.R.M.M. RAMAN CHETTY v. MESSRS. STEEL BROTHERS AND COMPANY, LIMITED.

The claim of the Appellant was based upon a mortgage, dated the 30th December 1903, by which the steam launch and most of the cargo boats were mortgaged by Maung Gyi to one, Nagappa Chetty, who was the agent of the present Appellant, to secure a sum of money then advanced. On the 30th November 1904, and on the 24th July 1905, further mortgages or charges were made in favour of persons who are no parties to the present proceedings; and, owing to the course pursued by the parties interested and to the course of the present proceedings, those last-mentioned transactions need not be considered in disposing of the present case. That case is concerned with Nagappa's mortgage of the 30th December 1903, and that of Steel Brothers, the Respondents, dated the 14th September 1905; and the sale-proceeds being insufficient to meet the two claims, or indeed either of them in full, the question is, which of them is entitled to priority over the other? Both the learned Judge who sat in Insolvency and those who heard the Appeal from his Judgment, decided in favour of the Respondents.

On the argument of the Appeal before their Lordships, several questions were argued, some of which might have given rise to difficulty if it had been necessary to decide them; but in their Lordship's opinion the case may be, and ought to be, disposed of upon one ground which is simple and clear, namely, that the Appellant was an assenting party to the mortgage or charge executed in favour of the Respondents, and actually received a large portion of the mortgage money thus raised. This is quite clear from the letter dated the 12th December 1905; and the mortgage or charge in favour of the Respondents contained an express covenant that the property mortgaged was free from encumbrances. The Appellant, having thus concurred in inducing the Respondents to advance their money, as a first charge, cannot now turn round and claim priority over that charge in favour of their own mortgage subsisting from an earlier date.

On this ground their Lordships are of opinion that the case has been rightly decided in Burma, and that this Appeal should be dismissed, and they will humbly advise his Majesty accordingly.

The Appellant will pay the costs of the Appeal.

Criminal Revision Nos. 250A & 251A of 1911.

May 22nd 1911.

Before Mr. Justice Twomey

KING-EMPEROR v. ENG GYAUNG.

Whipping—Concurrent sentences of—Illegal.

Concurrent sentences of whipping are illegal.*

King-Emperor v. *San E and others*, 4 L.B.R., 147, referred to.

The accused was convicted of theft in a house (section 380, Indian Penal Code) in one trial and of lurking house-trespass by night (section 456, Indian Penal Code) in another on the same day. The Magistrate in each case sentenced the accused to

1911.

KING-EMPEROR v. ENG GYAUNG.

suffer 15 lashes; but he directed that the sentences should run concurrently. It is not clear from the records whether the accused actually received 15 lashes or 30 lashes in all. In each case the warrant has an endorsement showing that 15 lashes have been inflicted.

It has been laid down clearly in *King-Emperor* v. *San E and others* (1) that a sentence of imprisonment cannot be ordered to run concurrently with another sentence passed in another case. There is no express ruling which forbids a Magistrate to pass concurrent sentences of whipping. But the Magistrate's order in the second case is clearly illegal. It should have been obvious to him that the word "concurrent" properly applies only to sentences of imprisonment. The literal meaning of concurrent sentences of whipping is that the prisoner is to be flogged by two operators simultaneously—a result which was no doubt far from the Magistrate's mind when he passed the sentences.

A short term of imprisonment should have been awarded in the second case. But it is unnecessary to take any further action now.

Before Mr. Justice Hartnoll, Officiating Chief Judge, and Mr. Justice Ormond.

Civil 1st Appeal No. 155 of 1909.

June 14th, 1911.

1. VALLIAPPA CHETTY
2. ALLAGAPPA CHETTY
3. ALLAGAPPA CHETTY
4. SWAMINATHEN CHETTY

v. THA HNYIN.

M. C. Naidu—for appellants (defendants).

Chit Hlaing—for respondent (plaintiff).

Equitable mortgage—Deposit of title-deeds of property situated outside the towns mentioned in section 59, Transfer of Property Act, 1882.

A valid equitable mortgage can be made in any of the towns mentioned in section 59 of the Transfer of Property Act by a deposit of title-deeds, although none of the property is situated within any of those towns.

Madho Das v. *Ram Kishen*, (1892) I.L.R. 14 All., 238; *Manekji Framji* v. *Rustomji Naserwanji Mistry* (1889) I.L.R. 14 Bom. 269; *Srinath Roy* v. *Godadhur Das*, (1897) I.L.R 24 Cal. 348; followed.

Ormond, J.—The pleadings and the grounds of appeal in this case are exactly similar to those in Civil 1st Appeal No. 2 of 1910, and the question raised in this appeal is also the same. No issue was raised as to the place where the deposit of title-deeds was made. The evidence shows that the deposit was made at the time of the loan and that the loan was made at Moulmein. Although the lands were outside Moulmein, the deposit which was made in Moulmein created a good equitable mortgage. This appeal should, I think, be dismissed with costs.

Hartnoll, Offg. C.J.—The respondent sued the appellant firm of V.A.R. and another firm of A.V.P. under the following circumstances. He alleged that the A.V.P. firm borrowed

(1) 4 L.B.R. 147.

1911.

VALLIAPPA CHETTY v. THA HNYIN.

from him Rs. 5,000 on the 23rd August 1906 on the promissory-note on which he sues and as security for the debt deposited with him the title-deeds filed with the plaint. He stated that the lands to which the deeds referred were subsequently attached and brought to sale by the V.A.R. firm in execution of a decree of theirs against the A.V.P. firm and were purchased by the V.A.R. firm themselves. He therefore sued for Rs. 6,000 due on the promissory-note and for a mortgage decree in respect of the lands to which the title-deeds referred. These lands are situated outside the towns of Moulmein. The V.A.R. firm put respondent to strict proof of the debt and the equitable mortgage by deposit of title-deeds and urged that even if the respondent's allegations were true, he held no valid equitable mortgage over the lands. According to the judgment of the District Judge the only real contest in his Court was whether a deposit of title-deeds as security for the amount of a debt creates a valid mortgage in respect of the property represented by the title deeds if that property be not situated in one of the towns mentioned in section 59 of the Transfer of Property Act. The District Judge found against appellants on this issue and gave respondent the decree for which he prayed. The appellants now appeal. Their grounds are that the decision is against law and the weight of evidence, that an equitable mortgage of lands outside Moulmein cannot be created by the mere possession of title-deeds when there is no admission or evidence that deposit of title deeds was in fact made in Moulmein and that an equitable mortgage by mere possession of deeds cannot be created when there is no evidence as to how the deposit came to be made and whether money had been or was advanced when the deposit took place.

From a perusal of the record I am unable to see that it was contested that the deposit was not made in Moulmein. No distinct cross-examination took place as to whether the deposit was made outside Moulmein or not. No doubt it was for respondent to prove that the deposit was made in Moulmein, and from a perusal of the evidence I am of opinion that there is sufficient proof that it was so made. U Baw, Maung Tha Hnyin's son, deposes to managing his father's business and to his office being in Moulmein. He deposes to making the loan and to receiving the title-deeds as security. In his cross-examination he allows that his father sometimes made loans of small sums at his residence outside Moulmein and he says that then a different promissory-note book was used. Different to what? The natural inference is that it was different to the one used at the Moulmein office and the one on which the loan was made. The clerk deposes to writing the note and counterfoil, to making a note of the deposit of deeds, and to placing them in the safe. It is natural to conclude that this took place in the office. As there was no contest as to the place of deposit in the District Court and as the evidence is to the effect I have described, I must consider it sufficiently proved that the deposit was made in Moulmein.

1911.

VALLI-APPA CHETTY v. THA HAYIN.

The respondent produces more evidence of the equitable mortgage than mere possession of the deeds. He gives the evidence of his son and clerk that there was a loan and deposit of the deed as security for it. The envelope and the endorsement on it is also a significant piece of evidence. I must hold that the deeds were deposited as security for the loan.

The only other point for consideration is whether an equitable mortgage by deposit of title-deeds was created in that the lands to which the deeds relate is situated outside Moulmein. The third paragraph of section 59 of the Transfer of Property Act does not restrict the situation of the property to which the title-deeds relate. It does not say that the property must be within the towns mentioned in it. The point was specifically discussed in the case of *Madho Das* v. *Ram Kishen* (1), in which it was held that the property to which the title-deeds related might be without the limits of the towns mentioned in the section. In the case of *Manekji Framji* v. *Rustomji Naserwanji Mistry* (2), the property was outside Bombay, and it was held that if the transaction was proved there was an equitable mortgage by deposit of title-deeds. Another case that is against appellants is that of *Srinath Roy* v. *Godadhur Das* (3). I am of opinion that to create an equitable mortgage by deposit of title-deeds it is not necessary that the property to which they relate should be situated in one of the towns specified in section 59 of the Transfer of Property Act.

I therefore concur in dismissing this appeal with costs.

Before Mr. Justice Harlnoll, Officiating Chief Judge, and Mr. Justice Twomey.

Civil Revision No. 59 of 1911.

June 19th, 1911.

THAN PE *v.* { 1. BA THAN. 2. MA SHIN.

Hamlyn—for applicant.

Sanction to prosecute—Grant of, by one Judge of Chief Court—Revocation thereof not possible by a Bench of Judges—Meaning of sub-sections (6) and (7) of section 195 of the Code of Criminal Procedure.

On an application under sub-section (6) of section 195 of the Criminal Procedure Code for revocation of sanction granted by a Judge of the Chief Court sitting on the Original Side made to a Bench of two Judges of the same Court, it was held that a Bench is not a superior Court within the meaning of sub-sections (6) and (7) of section 195 of the Criminal Procedure Code, and therefore that the Bench had no power to revoke the sanction.

Sanction to prosecute the applicant under section 193 of the Indian Penal Code was granted by a Judge of this Court sitting on the Original Side, and the present application is made,

(1) (1892) I.L.R. 14 All., 238.
(2) (1889 I.L.R. 14 Bom., 269.
(3) (1897) I.L.R. 24 Cal., 348.

1911.

THAN PE v. BA THAN.

apparently under section 195 (6) of the Code of Criminal Procedure, for revocation of the order of "the Court below." The question arises *in limine*, whether there is any "Court below" in this case. Sub-section (6) of section 195 provides that a sanction may be revoked by any authority to which the authority giving it is *subordinate*, and sub-section (7) explains what is meant by "subordinate" in the case of Courts. It says that every Court shall be deemed to be subordinate to the Court to which appeals from it ordinarily lie. By a special provision of the Lower Burma Courts Act, 1900, appeals from decrees and orders made by a single Judge of the Chief Court lie to a Bench of two Judges. But the single Judge does not constitute a separate Court. He merely exercises one part of the jurisdiction of the Court, just as the Bench exercises another part. The Bench is not a superior Court, but a section of the same Court specially empowered to hear appeals from the single Judge. It seems to us that section 195 (6) and (7) contemplate that a sanction may be revoked only by a Court which is distinct from and superior to the Court that gave it. We are of opinion therefore that we have no power to interfere with the order of sanction in this case. The application is dismissed.

Privy Council.

(On appeal from the Chief Court of Lower Burma.)

Before Lord Macnaghten, Lord Shaw, Lord Mersey and Mr. Ameer Ali.

THA HNYIN *v.* HNIN I.

Order refusing to give a decree-holder permission to purchase at a sale held in execution of a decree—No appeal lies—Section 294 and clause (16) of section 588, Code of Civil Procedure, XIV of 1882, [Rule 72 of Order 21 and clause (j) of Rule 1, Order 43, Code of Civil Procedure, Act V, 1908].

No appeal lies from an order refusing to give a decree-holder permission to purchase at a sale held in execution of a decree.

Jodoonath Mundul v. *Brojo Mohun Ghose and one*, (1886) I.L.R. 13 Cal., 174, followed.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side. The following Judgment of the Chief Court (Sir Charles Fox, Chief Judge, and Mr. Justice Parlett) was delivered on 23rd August 1909:—

Civil 1st Appeal No. 97 of 1908.

August 23rd, 1909.

Parlett, J.—On the 17th July 1908 appellant applied for the execution of a decree against respondent by the sale of 33 promissory-notes which had been hypothecated to him. It does not appear that he made any application under section 294, Civil Procedure Code, 1882, for permission to bid for or purchase the notes. Notice was issued to respondent who on 28th July applied, among other things, for such a date to be fixed for the sale as to enable intending purchasers to ascertain the position and solvency

1909.

THA HNYIN v. HNIN I.

of the executants of the notes, who were residents in Karenni, and that appellant should not be permitted to bid at the sale. On 30th July 1908 the appellant replied by a petition, among other matters, advancing reasons why he should be permitted to bid. On 25th August 1908 orders were passed forbidding him to bid directly or indirectly for the promissory-notes, and directing that the sale should not take place for six months, and in the meanwhile that full particulars of the notes should be properly advertised, and notice of the date of sale sent to the executants of the notes.

Against this order this appeal is laid. It is objected that no appeal lies against an order refusing to give the decree holder permission to purchase at the sale. This was held in *Jodoonath Mundul* v *Brojo Mohun Ghose and one* (1), where it was ruled that section 588, clause (*16*), allowed an appeal only against an order under section 294, confirming or setting aside or refusing to set aside a sale. That this view is correct is, I consider, clear from a perusal of section 294 and of the connection in which alone the word "order" is used in that section. No authority to the contrary has been cited and I would hold that no appeal lies against the other refusing permission to bid or purchase at the sale. It was not argued whether an appeal did or did not lie against the order fixing the time of sale. It appears to have been taken as an order falling under section 244, clause (*c*), and therefore, in view of section 2, appealable as a decree.

I feel doubtful whether this is correct. Section 244 seems directed against multiplicity of suits, by enjoining that questions between the parties which could otherwise be determined by separate suit, shall, when arising in the execution of a decree, be determined then and there by the Court executing the decree. A question such as the fixing of the date of sale could only arise in execution proceedings, and I do not see how a separate suit could lie on it. I do not therefore think that it comes within the purview of section 244, or that an appeal lies. But whether this be so or not, appellant in paragraph 9 of his petition of 30th July expressly left to the discretion of the Court both the time to be fixed for the sale and the manner of proclamation, and he cannot now complain if he was taken at his word.

The only limitation put upon the Court's discretion by section 290 is the fixing of a minimum period of fifteen days: no maximum is fixed, and no grounds are shown for holding that, under the peculiar circumstances of the present case, the Court did not exercise a sound discretion in passing the order which it did pass.

I would dismiss this appeal with costs, two gold mohurs advocate's fees.

Fox, C.J.—I concur.

June 13th, 1911.

The Judgment of their Lordships of the Privy Council was delivered on the 13th June 1911.

(1) (1886) I.L.R. 13 Cal., 174.

1911.

THA HNYIN v. HNIN I.

Lord Macnaghten.—Their Lordships are of opinion that the judgment under appeal is right. If the Appellant had applied for leave to appeal, and his application had been refused, there could not have been any appeal. It is a matter of administration.

The point was expressly decided at Calcutta in the year 1886, and there is no authority impugning that decision. The point was raised there, and it was decided by the High Court that no appeal lies "from an order refusing to give a decree-holder permission to purchase at a sale held in execution of a decree."

Their Lordships will therefore humbly advise His Majesty that this Appeal ought to be dismissed. There is no appearance by the Respondent so that there will be no order as to costs.

Before Mr. Justice Hartnoll, Officiating Chief Judge.

Civil 2nd Appeal No. 92 of 1910.

1. MA WE
2. AUNG MYIN
3. PAN BAUNG
4. SHWE NYUN
5. PO SHEIN

v.

1. MAUNG CHEIK.
2. SHWE THAUNG.
3. MYA DUN.

S. N. Sen—for appellants (defendants).

Maung Pu—for respondents (plaintiffs).

Buddhist Law: Inheritance—Division of property amongst children by two marriages—Property acquired by parent after death of second spouse—Division thereof should be per stirpes *and not* per capita.

A was married twice and had four children by the first marriage. By A's second marriage she had two children.

A died leaving behind certain lands those in dispute which consisted of holdings in two Kwins L and S.

The lands in L were acquired by A when a division took place on her second marriage.

The lands in S were acquired by A after the death of the second husband

It was held that the former should be divided in equal shares between the children by the second marriage and that the lands in the latter should be divided *per stirpes* and not *per capita*, that is, that the children of each marriage should each get a half share to be divided equally amongst them.

Ma Leik v. *Maung Nwa*, 4 L.B.R., 110, referred to.

March 21st, 1911.

In this suit Maung Cheik, Maung Shwe Thaung and Maung Mya Dun sued Ma We, Maung Aung Myin, Maung Pan Baung, Maung Shwe Nyun and Maung Po Shein for a share of certain lands in Leikkwe and Shabaung North Kwins. They claimed by way of inheritance. It appears that the mother of the heirs was one Ma Hnin. She first married one Maung Shwe Thè, and had as issue by him Maung San Nyein, Maung Cheik, Maung Shwe Thaung and Maung Pan Baung (or Maung). Maung San Nyein is dead and has left behind a daughter, one Ma Shwe Myit She has waived her claim.

Maung Shwe Thè died and some ten years after Ma Hnin married one Maung Ywe by whom she had as issue Ma We,

who married Maung Aung Myin and Maung Mya Dun. It is to be noticed that Maung Mya Dun is a son of the second marriage. Maung Ywe died years ago. Ma Hnin died in 1270 B.E.

The lands in dispute have been left behind. The holding in Shabaung North Kwin appears to have been sold to Maung Shwe Nyun and Maung Po Shein by Ma We, but the plaintiffs dispute Ma We's right to sell them.

Ma We pleaded that, when Ma Hnin married Maung Ywe, there was a division between Ma Hnin and the sons of the first marriage in that Maung Cheik, Maung Shwe Thaung and Maung Pan Baung received the Shabaung North land as their share, and that this land was subsequently sold back to Ma Hnin by Maung Cheik for Rs. 80. She alo pleaded that she had purchased both holdings from her mother. Maung Shwe Nyun and Maung Po Shein pleaded that as they had bought the lands and were in possession they should not be made to part with them.

The Township Court found the sales alleged by Ma We not proved, that the lands were as regards the Leikkwe land brought to Ma Hnin's second marriage whereas as regards the Shabaung North land it was acquired during the second marriage, and that there was no legal division of inherittance between Ma Hnin and the sons of the first marriage. The Townships Court then proceeded to divide the inheritance and gave a decree in accordance with such division.

An appeal was then laid to the District Court and the gaounds taken were principally that the sales alleged by Ma We were proved, that the remaining property was divided among the heirs after the death of Ma Hnin, that the lands in dispute were the separate property of Ma Hnin, and that no weight was attached to the fact that the lands were sold to the 4th and 5th appellants by Ma We and Aung Myin long before the institution of the suit.

The District Court wrote far too short and cursory a judgment, found the alleged sales not proved and the division made by the Township Court suitable. This appeal has now been laid. The principal grounds are that the judgment of the District Court does not conform with law, that the issues which have been framed are insufficient and that the effect of the sale to Maung Shwe Nyun and Maung Po Shein has not been considered.

The judgment of the District Court was far too cursory and attention is directed to Order 41, Rule 31, of the Civil Procedure Code. It therefore remains to reconsider the case.

I will first consider the alleged sales. Ma We states that she purchased the Leikkwe lands some eleven years ago for Rs. 75, that Myat Thin and Pan Baung were present, that the five heirs were present and the Rs. 57 were distributed amongst them equally. Pan Baung corroborates her in brief terms. He appears to be an opium consumer. Myat Thin deposes to witnessing a

1911.

MA WE
v.
MAUNG CHEIK.

sale but he gives a different account to Ma We, and his evidence is very vague. He does not even know what land was being sold. It is not explained why Ma We did not get her share of the sale proceeds. I therefore concur in holding unproven the sale of the Leikkwe lands. The mere fact that they happen to be in the name of Maung Aung Myin and Ma We is not sufficient to prove the sale.

As regards the Shabaung North lands they are in the name of 'Ma We, daughter of Ma Hnin,' or 'Ma Hnin, daughter of Ma We,' meaning both persons. Ma We states that she purchased the lands seven years ago for Rs. 100, of which Maung Cheik took Rs. 30 and her mother Rs. 70 ; but according to her Maung Cheik had sold the land back to her mother. I do not therefore understand why, when she bought from her mother, he should take anything at all. She called as her witness Maung Kya Ban, father of Maung Shwe Nyun, and so his testimony is not of much value. Maung Tha Hnin and Maung Myat Pan give evidence of mutation of names ; but it is not clear as to what were the details of the mutation. Tha Hnin is headman and says that Ma We has paid the revenue for the land ten years. I am unable to hold that Ma We has proved the sale she has set up. There is no good evidence of it. She was living with her mother, and, if the land is in her name, it may have been placed so for purposes other than that of sale ; moreover it is not at all clear that it is not in her and her mother's name. This finding disposes of the alleged sales.

The next point is as to the alleged division between Ma Hnin and the children of the first marriage. Can it be considered at all as it was not specifically raised in the grounds of appeal to the District Court ? The grounds were not well-drawn ; but one referred to Ma Hnin's separate property, and so I will consider it. Maung Cheik deposes to there having been such a division. He and his two brothers, Shwe Thaung and Pan Baung, appear to have obtained the Shabaung North lands. He seems to have bought out his brothers and then resold the land to his mother. The Township Court seems to have considered that the division was not one contemplated by the Dhammathats. He does not say why. The texts on such a division are collected at pages 94 to 96 of the first volume of the Digest. Such a division on remarriage of the mother is clearly authorised. I see no reason why it should be held ineffective in the present case, and on Maung Cheik's admission I must hold that it took place. The result of such a finding seems to be that after it the Leikkwe lands came to be Ma Hnin's separate property, and that the Shabaung North lands also came to be her separate property, as they seem to have been purchased by her after the death of Maung Ywe.

The next ground for consideration is the effect of the sale to Maung Shwe Nyun and Po Shein. This point also was not considered by the District Court. It is pleaded that there is an estoppel. This plea was never directly raised until

1911.

MA WE v. MAUNG CHEIK.

now. The word "estoppel" is not used in the pleadings. Paragraph 4 of the grounds of appeal to the District Court does not even directly raise it. But it seems to me that there is no estoppel. Ma Hnin seems to have died in Tagu 1270 B.E. The sale seems to have taken place the month before in Tabaung. At that time Ma We lived with her mother, and it appears to me that Maung Shwe Nyun and Po Shein should have been on their guard and made due enquiries. A child living with an aged mother is apt to manage the mother's property, and when under such circumstances a child sells landed property the purchasers should enquire into the title of the child to do so. It is not sufficient to say that the property was in the child's name and that the child had been dealing with it before, when there are other heirs who may be interested. In this case it is even doubtful whether the lands were not in the joint names of Ma Hnin and Ma We. I must hold that there is no estoppel.

The last point for consideration is what division is suitable.

The Leikkwe lands must be held to be lands which belonged to Maung Shwe Thè and Ma Hnin and which fell to Ma Hnin's share when division on the second marriage took place.

The Shabaung North lands must be held to be lands purchased by Ma Hnin after the death of her second husband. The Buddhist texts applicable have not as yet been fully discussed, and a further date will be put down for hearing as to what division is suitable. I would again note that Maung Mya Dun is a son of the second marriage.

Final Judgment.

15th May, 1911.

The further arguments have now been heard.

Counsel on both sides agree that as regards the Leikkwe lands the children of the first marriage have no claim to them. Maung Cheik and Maung Shwe Thaung are not entitled to any share in them. Ma We and Maung Mya Dun are the children of the second marriage. They are each therefore entitled to a half share in these lands.

As regards the Shabaung North lands no texts of the Dhammathats were quoted so as to show what the division should be, nor do I know of any. The case of *Ma Leik* v. *Maung Nwa* (1) was cited as an analogous case. In that the lands are found to have been acquired by Ma Hnin after the death of her second husband there seems to be no good reason for excluding the children of the first marriage from a share in them, and also no more reason for favouring the children of one marriage more than the children of the other. The division should be *per stirpes* and not *per capita*. I therefore give the children of each marriage an equal share in them.

(1) 4 L.B.R., 140.

1911.

MA WE v. MAUNG CHEIK.

In the result the decree of the Township and District Courts will be varied and it is ordered and decreed as follows :—

Maung Mya Dun will receive a half share in the Leikkwe lands.

Maung Cheik and Maung Shwe Thaung will each receive one-sixth share in the Shabaung North lands.

Maung Mya Dun will receive one-fourth share in the Shabaung North lands.

Each party will pay their own costs throughout in all Courts.

Before Mr. Justice Harlnoll, Officiating Chief Judge,

Civil 2nd Appeal No. 55 of 1910.

1. HLA U
2. MYIN MA } *v.* AUNG DUN.

June 4th, 1911.

R.N. Burjorjee—for appelants (defendants).

Respondent (plaintiff)—in person.

Buddhist Law—Gifts made by parents to a son on his entering the priesthood—Followed by possession—Power of disposal over the property—Vested absolutely in donee.

When the posession of proyerty follows the gift therof by parents to their son on entering the priesthood, the property passes absolutely to the donee and the parents have no longer any power of disposal over it.

Pan U v. *Mi Kyu*, S.J., L.B., 30., 2nd Edn., referred to.

The further issues have now been tried and appellants do not dispute the findings come to by the lower Courts on them which are to the effect that the two buffaloes given came into the possession of respondent at the time of the gift and that the pledging was some years subsequent to this. It now appears that the female buffalo has died and left an offspring which is one of the animals now in dispute. Owing to the inaccurate plaint and manner in which the evidence was given at the first hearing this was not apparent until the issues fixed by me came to be tried. The rules contained in the Dhammathats respecting gifts made to children at the time of entering the priesthood are contained in section 82, 119, and 124 of the Kinwun Mingyi's Digest. Appellants rely on the case of *Pan U* v. *Mi Kyu* (1). That case does not seem to me to be applicable as it dealt with a gift where possession never passed to the donee. Here it is found that possession did pass at the time of the gift. The contention that parents can dispose of gifts of this character during their lifetime can only be raised, it seems to me, where delivery of possession has not taken place and where the property given remains in possession of the parents. Even in such a cash it may possibly be argued that parents have not the power of disposal over the property given. The texts are not unanimous on the point as far as I can see. In this case no decision seems necessary on the point, as here it is found that possession was given at the time

(1) S.J., L B., 30, 2nd Edn.

of the gift. Where there has been delivery of possession of the property given it seems to me clear from a consideration of the texts that the property passes absolutely to the donee and that the parents have no longer any power of disposal over it. In this view this appeal must fail and it is dismissed with costs.

1911.

HLA U
v.
AUNG DUN.

Before Mr. Justice Hartnoll, Officiating Chief Judge, and Mr. Justice Twomey.

Civil Miscellaneous No. 39 of 1911.

IN THE MATTER OF A 2ND GRADE PLEADER.

July 27th, 1911.

Agabeg—for the Pleader.

Misconduct of a pleader—Professional misconduct distinguished from personal misconduct—Any other reasonable cause, Meaning and extent of—not to be explained by the rule of "ejusdem generis"—Clause (f) of section 13 of the Legal Practitioners Act (18 of 1879).

The words "any other reasonable cause" in clause (*f*) of section 13 of the Legal Practitioners Act (18 of 1879) are not to be limited by clauses (*a*) to (*e*) of that section

The rule of "ejusdem generis" does not apply.

Full Bench Reference (Civil Reference No. 2 of 1901) of the Hight Court at Calcutta, VI C.W.N., 556, followed.

The charge against Mr. X is that he was guilty of unprofessional conduct in that he instituted a false suit (against A and B) for recovery of Rs. 153-8-0 due on mortgage bond and for sale of the property mortgaged for the said debt, or in that he as pleader for A in a Civil Miscellaneous (Insolvency) Case signed what he knew to be false schedules of the creditors and of the property of A and also as such pleader witnessed what he knew to be a false declaration that the said schedules contained a full and fair description of A's property and creditors knowing that he himself was at that time a creditor of A and that he was not entered in the said schedule of creditors and that he himself held a mortgage effected by A of property, namely, a house and land which were not entered in the said schedule of properties.

As regards the first charge it was objected that, if Mr. X had filed a false suit, he would not be guilty of unprofessional conduct, and it was urged that the filing of a false suit by a pleader would not be a ground for dismissal or suspension under section 13 (*f*) of the Act—that such a cause as is contemplated by clause (*f*) should be a cause "ejusdem generis" with the causes stated in clauses (*a*) to (*e*). There seems to be good ground for the argument that the filing of a false suit by a pleader in his personal capacity is not professional misconduct, but it would be personal misconduct and I am of opinion that it would come under clause (*f*) which says any other reasonable cause. Such cause need not necessarily be a cause "ejusdem generis" as the causes given in clauses (*a*) to (*e*). The view I take is not without authority to support it, for it is the same as that taken in

1911.

IN THE MATTER OF A 2ND GRADE PLEADER.

Full Bench Reference (Civil Reference No. 2 of 1901) of the High Court at Calcutta (1). The reasons for and against such a view are very fully discussed in that reference and it seems unnecessary to recapitulate them here, and so I will only say that it seems to me to be only common sense not to restrict the meaning of the words of clause (*f*) to the narrower construction suggested.

Civil 1st Appal No. 84 of 1909.

July 6th. 1911.

Before Mr. Justice Harlnoll, Officiating Chief Judge, and Mr. Justice Ormond.

1. MOMEIN BEE BEE ... ...
2. EBRAHIN MAHOMED DOOTHA ...
3. ADJIM MAHOMED DOOTHA ...
4. HASHIM MAHOMED DOOTHA. } Minors by their next friend MOMEIN BEE BEE.
5. FATIMA BEE BEE ... } Minors by their next friend MOMEIN BEE BEE.

} All heirs and legal representatives of the late MAHOMED YACOOBJEE DOOTHA.

v.

1. (*a*) ARIFF EBRAHIM MALIM ...
   (*b*) MAHOMED ...
   (*c*) HASHIM ...
   (*d*) RUSSOOL BEE BEE.
   } Minors represented by their father and guardian-*ad-litem* the said ARIFF EBRAHIM MALIM.
2. AHMED YACOOBJEE DOOTHA.
3. ISMAIL YACOOBJEE DOOTHA.
4. (*a*) FATIMA BEE BEE.
   (*b*) EBRAHIM EUSOOF DOOTHA.
   (*c*) GOLAM MAHOMED EUSOOF.
   } Minors by their guardian FATIMA BEE BEE.
5. (*a*) EBRAHIM ALI MODEN ...
   (*b*) ISMAIL EBRAHIM MODEN ...
   (*c*) CASSIM EBRAHIM MODEN.
   (*d*) ESOOF EBRAHIM MODEN.
   (*e*) HASHIM EBRAHIM MODEN.
   (*f*) FATIMA BEE BEE
   (*g*) RAHIMA BEE BEE
   } Minors by their guardian-*ad-litem* EBRAHIM ALI MODEN.

} All heirs and legal representatives of ASHA BEE BEE (deceased).

} Heirs and legal representatives of KHATISA BEE BEE (deceased).

Giles—for appellants.
Lentaigne—for 4th (*a*), (*b*) and (*c*) respondents.
J. R. Das—for 1st respondent.

(1) VI C.W.N., 556.

1911.

MOMEIN BEE BEE v. ARIFF EBRAHIM MALIM.

Administration suit to a Mahomedan Estate—Right of "retainer" or set-off as against an heir in respect of a barred debt owing by him to the Estate.

A sued B for the administration of the estate of their mother C, a Mahomedan, alleging that on C's death B had in his possession property belonging to the estate and asking that in the administration this should be brought into account in ascertaining B's share.

It was held, following English Law, that if one of the heirs owes a debt to an estate, even although it be time-barred under the Limitation Act, the Court is entitled to retain funds in respect of the debt when calculating the amount due to the heir.

Courtenay v. *Williams*, R.R. Vol. 64, page 403; *In re Cordwell's Estate* L.R. 20 Equity Cases 644; *In re Akerman*, (1891) L.R. 3 Ch. Dn., 212; *In re Taylor* (1894) L.R. 1 Ch. Dn., 671; *In re Wheller*, (1904) L.R. 2 Ch. Dn., 66; followed.

Dhanji Bhai Bomanji Gugrat v. *Navazbai*, (1877) I.L.R. 2 Bom., 75; *Lokenath Mullick* v. *Odoychurn Mullick*, (1891) I.L.R. 7 Cal., 644; referred to.

Hartnoll, Offg. C.J.—This is an appeal from a portion of a preliminary decree passed on the Original Side of this Court under the following circumstances. One Asha Bee Bee, now represented by her heirs and legal representatives, brought a suit against her brothers, sister and other heirs of her deceased mother, Rahima Bee, for the administration of the estate of the latter. During the lifetime of Rahima Bee the first defendant, Mahomed Yacoobjee Dootha, her son, now represented by his heirs and legal representatives as he has died, managed his mother's property. Rahima Bee died on or about the 21st June 1903. It is alleged by the plaintiffs that at the death of Rahima Bee, Mahomed Yacoobjee Dootha had in his possession property belonging to the estate and that in the administration this should be brought into account in ascertaining his share. Mahomed Yacoobjee Dootha contended that, as his mother died in 1903 and the suit was not brought till 1908, any suit against him to render an account of any property belonging to his mother, which might be in his hands, was time-barred at the latter date, 1908—and so that in this suit he could not be called upon to render such an account. The learned Judge on the Original Side considered the matter, and in passing the order directing accounts to be taken and that a Commissioner be appointed to take them, further directed such Commissioner to enquire into the question whether there is an obligation on Mahomed Yacoobjee Dootha to account to the estate for the period of his agency up to the death of Rahima Boo (Bee), and that he (the said Commissioner) do give Mahomed Yacoobjee Dootha an opportunity of accounting or showing cause why he should not account for the period aforesaid. This appeal has now been filed by Mahomed Yacoobjee Dootha and is being carried on by his heirs and legal representatives and the contention is that appellants cannot be called on to account as to whether at the time of Rahima Bee's death there was in Mahomed Yacoobjee Dootha's possession any of her easte, and that there is no law according to which, even supposing that at the time of Rahima Bee's death Mahomed Yacoobjee Dootha had

1911.

MOMEIN BEE BEE v. ARIFF EBRAHIM MALIM.

any of her property in his possession, such property must be brought to account in ascertaining his share. Cross objections have also been filed by Asha Bee Bee and the heirs and representatives of another deceased son and it is contended that Mahomed Yacoobjee Dootha should be compelled to account for estate left in his possession at the time of Rahima Bee's death and belonging to her and that before he can claim and get his share in the estate he must make good or account for all the monies belonging to Rahima Bee in his possession.

In the course of the argument certain English cases were cited to us. They were (1) *Courtenay* v. *Williams* (1), (2) *In re Cordwell's Estate* (2), (3) *In re Akerman* (3), (4) *In re Taylor* (4), and (5) *In re Wheeler* (5). These cases seem to lay down that in England the law as now administered is as follows. In a suit brought by a legatee to obtain payment of the legacy out of the assets of the testator the executor can retain so much of the legacy as is sufficient to satisfy a debt due from the legatee to the testator at the time of the death although the remedy for the debt was at the time of the death of the testator barred by limitation. It was held that the debt still existed through the remedy was barred. Similarly an administrator is entitled to set off against the share of one of the next of kin in an intestate's estate the whole of a debt of which a part had become barred by limitation. It was held that the portion of the debt which was time-barred was still due to the estate and that until the debtor discharged his duty to the estate by paying the debt which he owed to it he could have no right or title to any part of it under the statute. So again in *In re Akuman* (3) it was held that a person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. In that case the right to recover any money due to the estate, if any was due, was time-barred, and the rule was made to apply to such money if any. It was however held that the rule would not apply to freehold and leasehold hereditaments specifically given by the will and that they would pass as devised or left as legacies, and that with regard to them there was no obligation on the devisees or lagatees to first make good anything that they owed to the estate. But in the next case—that of *In re Taylor* (4)—it was held that though there was no right of retainer in respect of a specific devise of freeholds, leaseholds and specific chattels on the ground that the two things could not be measured one against the other, yet that where a debtor to the testator's estate is a specific legatee of the profits of a business reprented by moneys in the hands of the executors, the executors may retain such moneys as

(1) R.R. Vol. 64, page 403.
(2) L.R. 20 Equity Cases, 644.
(3) (1891) L.R. 3 Ch. Dn., 212.
(4) (1894) L.R. 1 Ch. Dn., 671.
(5) (1904) L.R. 2 Ch. Dn., 66.

against the debt. The same principles were followed in the latest case—*In re Wheeler* (5). It is argued that the law as administered in England in this respect should not be applied to Mahomedans in this country, as the theory of representation is not known to the Mahomedan law and under its provisions the estate of a deceased person devolves immediately on his death upon his heirs. The English rule has been applied in India in the cases of *Dhanji Bhai Bomanji Gugrat* v. *Navazbai* (6) and *Lokenath Mullick* v. *Odoychurn Mullick* (7). It is true that the parties in those two cases were not Mahomedans ; but I can see no valid reason why the rule should not be applied to Mahomedans. Before any division can take place, it must be determined as to what the estate consists of, and it seems to be only just fair and reasonable that if one of the heirs owes a debt to the estate, even although it be time-barred according to the Limitation Act, the administrator—that is, in this instance, the Court—should be entitled to retain funds in respect of such debt when calculating out the share of such heir. Another objection taken was that the English rule only applies in case of an ascertained debt and that here there is none such, and that further none such can be now ascertained as the right to bring a suit for an account is time-barred. I do not find much substance in this argument. In the case of *Courtenay* v. *Williams* (1) an enquiry was held to ascertain the amount of the debt, if any, at the time of the death of the testator. It is true that a suit for an account in this case would be time-barred ; but a special rule applies in such a case as this which is that, though the remedy may be time-barred, the debt still exists, if there be any such, and that the Court as administrator may retain any funds in hand with respect to that debt in calculating out the debtor's share.

With regard to the argument that the appellant cannot be forced to produce the accounts of his agency it seems to me that the burden of proof lies on the plaintiffs to prove any debt due by Mahomed Yacoobjee Dootha to his mother's estate on her death since they allege that there was such a debt. The plaintiffs have the right to prove their allegation in any legal manner, and the other side to prove the contrary in the same way. Further, if it be found that there was a debt due to the estate by Mahomed Yacoobjee Dootha at the time of his mother's death the English rule of law should be strictly followed. For instance, immoveable property and specific chattels cannot be retained in respect of it.

In the result I would alter that portion of the preliminary decree, which is appealed from, and instead thereof decree as follows :—It will be open to the plaintiffs to prove any debt due by Mahomed Yacoobjee Dootha to the estate at the time of Rahima Bee's (Bu's) death, and if any such debt be proved the amount thereof shall be deducted from the share which Mahomed Yacoobjee Dootha would otherwise have been entitled to in the

(6) (1877) I.L.R. 2 Bom., 75. (7) (1881) I.L.R. 7 Cal., 644.

1911.

MOMEIN BEE BEE v. ARIFF EBRAHIM MALIM.

estate of the deceased unless the property comprised in such share is of such a nature that a deduction therefrom would not have been made under English law :—and the amount (if any) to be so deducted shall be considered as an asset of the estate. I would pass no order as to the costs of this appeal.

Ormond, J.—I concur.

Before Mr. Justice Ormond.

Criminal Appeal No. 342 of 1911.

August 4th, 1911.

PO YÔN *v.* MESSRS. MOHR BROTHERS & CO., LTD.

Jordan—for appellant. | *McDonnell*—for respondent.

Cheating—Written contract—Proof of false representation of intention not contained in such written contract—Admissibility of such Evidence—Section 420, Indian Penal Code—Section 92, Indian Evidence Act.

The accused obtained an advance for which he gave a promissory-note, stating that he had two boat-loads of paddy in the adjoining creek and that he would bring the paddy to the complainant for sale : he then absconded

Held,—that the conviction under section 420, Indian Penal Code, was good ; that the facts warranted the inference that the accused, at the time of obtaining the advance, had no intention of performing his promise ; and that oral evidence was admissible to prove the representation of intention, although such intention was not contained in the written contract ; such intention not being inconsistent with the contract of loan.

J. Reid v. *So Hlaing*, 5 L.B.R., 241, referred to.

On the 14th June 1907 the accused sold one boat-load of paddy to the complainants at their mill through their broker Ko Hmya. Accused asked the broker for an advance of Rs. 1,500, saying that he had two more boat-loads of paddy in the Kanaungto Creek and that he would bring them to the mill and would sell the paddy to complainant. The broker took the accused to the Manager of the mill and repeated to him the accused's statement and obtained for the accused an advance of Rs. 1,500, for which he and the accused jointly executed a promissory-note in favour of the complainants. The promissory-note bears these words: "for value received this day in cash advanced for the supply of grain." The accused absconded and the complainants preferred a charge of cheating against him. He has been convicted under section 420 of the Indian Penal Code and now appeals.

Mr. Jordan for the accused contends that the transaction was one between the accused and the broker, and not between the accused and the mill ; and that upon the authority of the Full Bench case of *So Hlaing* (1), no evidence of the arrangement between the parties besides the promissory-note is admissible. Mr. McDonnell who appears for the prosecution asks me to hold

(1) 5 L.B.R., 241.

that under proviso 1 to section 92 of the Evidence Act, such evidence is admissible, in accordance with the opinion of Mr. Justice Twomey expressed in So Hlaing's case and also in accordance with the opinion of Mr. Justice Hartnoll expressed in the present case, when ordering further enquiry on the 15th September 1910.

I find it difficult to apply the first proviso of section 92 of the Evidence Act to the present case, because the promissory-note is not impugned in any way. But I think evidence of the false representation is clearly admissible. All that was decided in So Hlaing's case was that where a party to a written contract institutes a criminal proceeding against another party to such contract, and the question arises what the real contract between the parties was, the provisions of section 92 of the Evidence Act apply, and the complainant must be deemed to be a "party" to the case within the meaning of that section.

In a case of cheating such as the present case, the question primarily is :—Did the accused fraudulently or dishonestly induce the complainant to part with the money mentioned in the promissory-note by an untrue representation of fact? The representation of fact in this case being that the accused had two boat-loads of paddy in the creek and that it was his intention to bring them to the mill and to sell the paddy to the complainant. The question of admissibility of evidence only arises in connection with the representation of intention if the intention is expressed in an oral promise and if the oral promise is inconsistent with a contemporaneous written agreement which he is not impugned; or if the oral promise is such that (had it in fact been made) it would have been expressed in the written agreement; the rules of common sense, apart from the provisions of the Evidence Act, would exclude evidence attempting to prove such oral promise :—because any such evidence would not be sufficient to support a conviction in the face of the written agreement. But it would be open to the accused to show that the alleged representation was embodied in an oral promise which was inconsistent with the written agreement. Such evidence would be adduced—not "for the purpose of contradicting, varying, adding to, or subtracting from the terms of the written agreement,"—but for the purpose of showing either that the alleged representation could not have been made, or that it could not have operated as an inducement to the complainant to part with his property. On the other hand, if the alleged representation of intention is not inconsistent with the written agreement, and would not have been embodied in it, there is nothing in the Evidence Act to preclude evidence being adduced to prove the representation.

A promissory-note is essentially a self-contained and complete contract in itself; and a promise to deliver goods could not be a term of that contract. To admit therefore evidence to prove such a promise would not be to *add* to the terms of the promissory-note. And the only question that could arise as to the admissibility

1911.

PO YON v. MESSRS. MOHR BROTHERS & CO., LTD.

of evidence to prove the alleged representation of intention would be :—Is the alleged representation inconsistent with the contract embodied in the promissory-note? No presumption arises that, because there was a promissory-note, there were no other contemporaneous transactions or negotiations between the parties. Promissory-notes are frequently used as security in commercial dealings when advances are made ; and I see nothing inconsistent in a mill giving as a loan repayable on demand, money to a trader who has agreed to sell paddy delivery of which is to be given on a future date ; even though it may be understood by both parties that in all probability the loan would not be called in before the date for delivery of the paddy, and that on delivery the price would be deducted from the loan. The loan is in fact independent of the contract of sale ; although the contract of sale (or more strictly speaking, the representation of the vendor that it was his intention to deliver the paddy in accordance with the contract of sale) operated as an inducement to the purchaser to make the loan. In the present case there was no contract of sale. The intention of the accused (if true) to bring and to offer for sale the paddy would be a fact independent of any contract and would not be inconsistent with a contract of loan, though it might have been induced by, and was an inducement for, the loan.

There can be no doubt that the alleged representation was made by the accused to the broker, in order that the broker might obtain the Rs. 1,500 from the complainants upon the faith of that representation, as a loan from the complainants to the accused ; and that the complainants were induced by such representation of the accused to deliver the Rs. 1,500 to the accused. If then the representation has been proved to be false, the offence of cheating has been made out. It is not sufficient to prove that the accused promised to bring paddy to the mill at some time or other and failed to do so; the prosecution must show that the representation made by the accused was false, *i.e.*, that at the time of making it he had no intention of carrying out the promise. The accused's representation was that he had the two boat-loads of paddy then in the creek and that his intention was to bring that paddy to the mill the next day. After receiving the Rs. 1,500 the accused absconded ; I think it is legitmate to draw the inference from those facts that the accused's representation was false ; and his defence is that he does not remember the transaction. The accused has been sentenced to three years' rigorous imprisonment. I uphold the conviction, but I think that a sentence of one years's rigorous imprisonment is sufficient. I alter the sentence accordingly.

Before Mr. Justice Twomey.

Criminal Appeal No. 387 of 1911.

NGA I *v.* KING-EMPEROR.

Eggar, Assistant Government Advocate—for King-Emperor.

Interpretation of terms—"Uses a deadly weapon" in section 397, Indian Penal Code—Comparison of, with "armed with a deadly weapon" in section 398, Indian Penal Code—Intention of Legislature to be considered.

Within the ordinary meaning of the words "uses a deadly weapon" in section 397, Indian Penal Code (XLV of 1860), must be included the carrying of a weapon for the purpose of overawing the person robbed.

Section 398 provides a minimum punishment for those who attempt to commit robbery "armed with a deadly weapon" and the Legislature cannot have intended that a criminal should be urged to complete his purpose by the reflection that if he stops short at an attempt the minimum imprisonment that can be inflicted on him under section 398 is seven years, while if he completes the offence he will not come within the provisions of section 397, but may be sentenced to two or three years' imprisonment under section 392.

July 7th, 1911.

The appellant was at first convicted under section 392 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for eighteen months by the Subdivisional Magistrate, Kyaukpyu. On appeal the Sessions Judge held that section 397 of the Indian Penal Code applied to the case as the appellant was armed with a dagger and that as the minimum punishment prescribed by section 397 of the Indian Penal Code is imprisonment for seven years the Magistrate had no power to try the case. A fresh trial was ordered before the District Magistrate, Kyaukpyu, under sections 392 and 397. The District Magistrate has convicted the appellant under these sections and sentenced him to suffer rigorous imprisonment for seven years.

The facts are clearly proved. There is no doubt that the appellant took a *gaungbaung* from the complainant by overawing him with a dagger. The only question is whether section 397 of the Indian Penal Code applies, *i.e.*, whether it can be said that at the time of committing the robbery the appellant "used" the dagger. He did not stab with it, but only raised it threateningly so as to compel the complainant to part with his property.

It may be argued that to "use" a stabbing weapon is to stab some person with it, and to "use" a cutting weapon is to cut some person with it, and to "use" a gun is to shoot at some person with it. According to this narrow interpretation, brandishing a dagger or levelling a gun at a man might be regarded as merely *threatening* to use or *preparing* to use it, not as actually using it. But it is not clear that the word "uses" in section 397 should be interpreted with such strictness. The very next section 398 imposes a minimum punishment of seven years' imprisonment on persons convicted of merely carrying a deadly weapon when attempting to rob. It seems probable that the Legislature intended to impose the same minimum where the

1911.

NGA I v. KING-EMPEROR.

robbery is actually completed. I am inclined to think therefore that the word "uses" in section 397 should be construed in a wide sense so as to include not merely cutting, stabbing, shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed.

It is no doubt at first sight remarkable that wider language is employed in section 397 ("uses any deadly weapon") than in section 398 ("is armed with any deadly weapon"). The explanation is apparently that in attempted robberies it is often difficult to prove any "use" of the deadly weapon except the mere fact that the accused carried it, whereas in a case of completed robbery it generally happens that the accused not only carries the deadly weapon but also overawes the person robbed or even stabs, cuts or shoots at him.

The wider view of section 397 is supported by a passage in Maxwell's Interpretation of Statutes (1):—"If a man walks with a gun with intent to kill game he 'uses' the gun for that purpose without firing, within the statute which makes using a gun with that intent penal." English and American authorities are given for this interpretation.

As, however, the question is not altogether free from doubt, and as no published rulings dealing with the point have been discovered, I admit this appeal for the purpose of argument. It would be well to instruct the Government Advocate to appear in support of the conviction and sentence.

August 28th, 1911.

I have now had the advantage of hearing the learned Assistant Government Advocate in this case. He agrees with me that the word "uses" in section 397 of the Indian Penal Code must be interpreted in a wide sense.

If the accused had merely attempted to take the complainant's property by overawing him with a dagger but (owing to infirmity of purpose on his own part or resistance on the part of the complainant) had not carried out his design, he would undoubtedly be liable to the minimum punishment provided in section 398. The Legislature cannot have intended that if the criminal goes a step farther and actually accomplishes his purpose he should thereby establish a claim to more lenient treatment. It cannot have been intended that a criminal should be urged to complete his criminal purpose by the reflection that if he stops short at an attempt he must get seven years, while if he completes the offence he may get off with imprisonment for two or three years.

The appal of Nga I is therefore dismissed.

At the same time I note that the robbery in this case was a comparatively petty affair. The accused is a youth of 20 and this is his first offence. But for the imperative provisions of section 397 it is not a case in which such a severe sentence as rigorous imprisonment for seven years would be imposed. The

(1) 4th Edition, page 419.

District Magistrate might instruct the jail authorities to report on Nga I's conduct in jail after, say, three years of his sentence have expired. If his conduct has been good the case might be brought to the notice of the Local Government with a view to the consideration of the question of clemency.

1911.

NGA I *v.* KING-EMPEROR.

Before Mr. Justice Hartnoll, Officiating Chief Judge, and Mr. Justice Ormond.

PO NYUN *v.* { A. V. R. M. MUTHU KARAPAN CHETTY BY HIS AGENT RAMSWAMY CHETTY.

Civil 2nd Appeal No. 71 of 1910.

August 30th 1911.

May Oung—for appellant (defendant).

N. M. Cowasjee—for respondent (plaintiff).

Limitation—Good faith or due diligence—Sub-section (1) of section 14 Limitation Act, IX of 1908.

A sued B to recover certain sums due to his firm on two promissory notes.

The suit was dismissed on the ground that the notes had not been endorsed to A by his two partners who had retired from the firm since the making of the promissory-notes.

A then brought a second suit after securing the necessary endorsements.

The question arose as to whether the suit was then barred by limitation under section 14 (*1*), Limitation Act, 1908.

Held after consideration of the third explanation added to that section, as worded in the Act of 1877, by the Act of 1908, that as A had not acted otherwise than with good faith and due diligence the suit was not barred.

Jema v. *Ahmed Ali Khan*, (1890) I.L.R. 12 All, 207; *Deo Proshad Sing* v *Pertab Kairee*, (1883) I.L.R. 16 Cal, 86; referred to.

Mathura Singh v. *Bhawani Singh*, (1900) I.L.R. 22 All., 248, followed.

Hartnoll, Offg. C.J.—In Civil Suit No. 13 of 1908 A.V.R. M. Muthu Karapan Chetty sued Maung Po Nyun to recover Rs. 3,892-8-0 due from him on account of principal and interest accrued on two promissory-notes said to have been executed by him on the 5th June 1906. The plaintiff alleged, that, when the loans were made, his firm consisted of himself, Ramswamy and Kistnappa, and that the two latter sold him their interest in the firm on the 17th August 1907 when he became the sole owner and proprietor thereof. His suit was dismissed on the ground that the promissory-notes had not been endorsed over to him by the members of the old firm. The suit was instituted on the 8th July 1908 and decided on the 30th January 1909. On the 5th August 1909 he brought a fresh suit on the notes against Po Nyun to recover the amounts then due on them having had the necessary endorsements made on them in the meanwhile. He obtained a decree. In the District Court an issue was fixed as to whether the suit was barred by limitation or not, but at the hearing this issue was not contested by Po Nyun's counsel. On appeal the issue was again raised by Po Nyun and was then decided against him. Now this second appeal has been laid on the same point. If section 14 (*1*) of the Limitation Act be held

1911.

PO NYUN v. A. V. R. M. MUTHU KARAPAN CHETTY.

to apply the suit is clearly not time-barred, and so the point for consideration is as to whether it should be held to apply or not. A new explanation has been added to the section in the old Act by the new Act IX of 1908, which runs: "For the purposes of this section misjoinder of parties and causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction." Perhaps this explanation was added in view of the diversity of opinion as to the construction of the words 'other cause of a like nature' in section 14 (*1*) that existed. In the case of *Jema* v *Ahmed Ali Khan* (1) it was held that the words meant some cause analogous to defect of jurisdiction and the question of analogy was discussed in that case. The reasoning in the case of *Deo Proshad Sing* v. *Pertab Kairee* (2) was not followed. The meaning of the words was discussed in the case of *Mathura Singh* v. *Bhawani Singh* (3) and I am in accord with the construction put on the words by Strachey, C.J., which was:—

> If there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction.

The new explanation added to section 14 of the Act seems to emphasize that the intention of the Legislature is expressed by such view. I therefore adopt it in the consideration of this case. I cannot see that the plaintiff in his first suit acted otherwise than with good faith and due diligence. He failed from a cause which he appears to have had no knowledge of and which was obscure and of a highly legal nature. I would therefore give him the benefit of section 14 (*1*) of the Limitation Act and dismiss this appeal with costs.

Ormand, J.—I concur.

Before Mr. Justice Harlnoll, Officiating Chief Judge, and Mr. Justice Twomey.

Civil Misc. Appeal No. 97 of 1910. Sept 20th, 1911.

ON PE *v.* KUN TI.

Ginwala—for appellant. | *Villa*—for respondent.

Machinery—"*Trade Fixture*"—"*Reputed owner*"—"*Goods*"—*Section 16*(3) *Provincial Insolvency Act, III of 1907.*

A heavy oil press worked by a kerosene oil engine, even though the whole may be removeable without damage to the building, does not fall within the scope of the word "goods" in sub-section (3) of section 16 of the Provincial Insolvency Act, 1907.

Horn v. *Baker*, (1808) 9 East, 215; *Macleod* v. *K. Khushal*, (1901) 3 Bom. L.R., 426; followed.

Evidence has now been recorded as to the nature of the machinery in question—an oil press worked by a kerosene oil engine. The press weighs 1½ tons and the engine about ¾ths of

(1) (1890) I.L.R. 12 All., 207.
(2) (1883) I.L.R. 10 Cal., 86. | (3) (1900) I.L.R. 22 All., 248.

1911.

ON PE v. KUN [illegible]

a ton. The machine is removeable by unscrewing bolts. The shafting and pulleys are bolted on to the posts of the house. The whole is capable of removal without damage to the building. The District Judge, having regard to its easy removeability, considers that it is not a fixture.

For the respondent it is pointed out that fixtures are not regarded as part of the immoveable property to which they are attached unless they are permanently attached and are clearly accessory to the immoveable property and are for the beneficial emjoyment thereof. The English rulings which support this view are cited in paragraph 79 of Gour's Transfer of Property Act, 3rd Edition (Volume I), in which the learned author further remarks : "machines and other trade fixtures, therefore, do not come within the scope of this clause," namely, the clause defining the term "attached to the earth."

In this case, however, we are not concerned with the definitions in the Transfer of Property Act but with the terms "goods" and "reputed owner" in section 16 (*3*) of the Provincial Insolvency Act. As noted in the order of 21st March 1911, we have to be guided by the English authorities and they appear to be entirely in favour of the appellant. The articles that were treated as fixtures under the Bankruptcy law in the leading case of *Horn* v. *Baker* (1) were certain stills in a distillery. The stills were "fixed to the freehold," being set in brickwork and let into the ground. Such articles would probably be regarded as trade fixtures under the Transfer of Property Act and would not form part of the immoveable property. For example, they would not pass with the property under section 8 of that Act. But it was decided in *Horn* v. *Baker* (1) that they did not pass to the assignee in bankruptcy. That case has been consistently followed in England. It has been followed also in the Bombay case, *Macleod* v. *K. Khushal* (2), where it was held that certain trade fixtures (including machinery) were not goods and chattels in the possession order or disposition of the insolvent as reputed owner. It was pointed out that according to the English authorities the fact of the articles being removeable by a tenant makes no difference.

There is no doubt that the machinery in this case was fixed to the ground though perhaps not so firmly fixed as the stills in *Horn* v. *Baker* (1).

We consider it clear therefore that the machinery in question does not fall within the scope of the work "goods" in section 16 (*3*) of the Provincial Insolvency Act.

The order of the District Court is set aside and the claim of the mortgagee (appellant Maung On Pe) is allowed. The respondent will pay the costs of the appellant in both Courts. Advocate's fee, three gold mohurs.

(1) (1808) 9 East 215.

(2) (1901) 3 Bom. L.R., 426.

Criminal Appeal No. 631 of 1911.

November 9th, 1911.

Before Mr. Justice Ormond.

WONG YONE MAIN *v.* KING-EMPEROR.

Dawson—for appellant. | *Lentaigne*—for respondent.

Section 409, Indian Penal Code—Criminal breach of trust—Loan inconsistent with Trust.

A was convicted of criminal breach of trust in respect of an advance given to him for the purpose of buying paddy and selling it to the complainant. He signed a promissory-note payable on demand for the amount advanced.

Held,—that the conviction was bad, the transaction being a loan and not a trust.

Tha Po v. *King-Emperor*, 3 L.B.R., 200, discussed.

Pwa Gyee v. *Queen-Empress*, 2 Bur. L.R., 9 ; *Maung Myine* v. *Queen-Empress*, 2 Bur. L.R., 11 ; *Tha Dway* v. *Queen-Empress*, 2 Bur. L.R., 18 ; *Queen-Empress* v. *Moss*, (1893) I.L.R. 16 All., 88 ; referred to.

The accused has been convicted under section 409 of the Indian Penal Code of criminal breach of trust as a broker in respect of the balance of an advance given to him by the Colonial Trading Company for the purpose of buying paddy. At the time of the advance the accused signed an agreement (Exhibit A) under which he undertook to use the money solely in buying paddy and to deliver the paddy to the Company's mill within 25 days—the value of the paddy to be credited at the market rate of the day of delivery; and at the same time he signed an ondemand promissory-note for the amount of the advance. Mr. Dawson for the accused contends that the transaction was a loan and therefore not a trust. Mr. Lentaigne for the prosecution contends that the relation of debtor and creditor is not incompatible with the existence of a trust in respect of the money advanced. I am referred to three decision* in the Recorder's Court reported in Volume 2, Burma Law Reports, at pages 9, 11 and 18 respectively. In all three cases a promissory-note was given by the accused. The first and last cases are decisions of Mr. Agnew. He says at page 10 :—

> The fact that the relation of debtor and creditor is established does not necessarily make it impossible to convict the debtor of criminal breach of trust. Such a relation exists between a banker and his customer in respect of the customer's money in the banker's hands. The banker is entitled to use that money in legitimate banking business. If he loses it in such business, he cannot be liable for criminal breach of trust. But if he dishonestly uses that money he can be made liable.

He finds that a trust was created because the money was advanced for a particular purpose, to be applied in a particular way for the "*owner's*" benefit; and found that there was no "loan" in the ordinary sense of the word. Mr. McEwen on the other hand in the case before him found that there was no trust

* (*a*) Pwa Gyee *v.* Queen-Empress, page 9.
(*b*) Maung Myine *v.* Queen-Empress, page 11.
(*c*) Tha Dway *v.* Queen-Empress, page 18.

but merely a loan. I am also referred to the case of *Tha Po* v. *King-Emperor* (1) decided by Mr. Justice Irwin who found that there was a trust because the money was advanced for a specific purpose. He agreed with the views of Mr. Agnew set out in Volume 2, Burma Law Reports, at page 10. At page 202 Mr. Justice Irwin cites Mayne's definition of a trust, *viz.*, "any arrangement by which one person is authorized to deal with property for the benefit of another" and continues:—"If that definition be correct it is immaterial whether the money was lent or not so long as it was advanced for a specific purpose for the benefit of the lender." I do not understand Mr. Justice Irwin to say that a loan in the ordinary sense of the word is compatible with a trust in respect of the money advanced.

The decision in effect, I think, is this—that the money was entrusted by the complainant to the accused to be invested in paddy for the benefit of the complainant; and the fact that the accused agreed to make good to the complainant any loss on such investment (in consideration of the accused being allowed to retain and profit in the event of the paddy being purchased at a price below the market rate prevailing at the time of delivery) was not incompatible with the existence of a trust. In that case there was no promissory-note. Mr. Agnew in the two cases decided by him attached no importance to the fact that a promissory-note formed part of the transaction.

If the transaction in this case created a trust, the accused would not be liable to repay the money on demand, *e.g.*, after the paddy had been bought and before it was delivered in due course to the Company. But there is nothing inconsistent in the two documents taken together if each document is given its ordinary and plain meaning. They show in my opinion that the money was advanced to the accused as a loan, pure and simple, which loan was repayable on demand; and that the accused undertook to buy paddy with the money and to sell the paddy to the Company at the current market rate.

The accused in this case was, strictly speaking, not a broker but a dealer; and the advance was taken and made, as much for his benefit as for the benefit of the Company. The fact that the Company was induced to make the loan by the accused giving this undertaking, does not transform the loan into a trust. If the accused at the time of the loan had no intention of performing such undertaking he would be guilty of cheating: but if he had at that time such intention, he would not be criminally liable if he subsequently failed to carry out his undertaking.

In the case of a loan the property in the money passes to the borrower; and I find it difficult to understand how a person could be held liable for criminal breach of trust in respect of property of which he is the sole owner. I was referred by Mr. Lentaigne to the case of *Queen-Empress* v. *Moss* (2) to show that the Directors of a Bank can be liable for criminal breach of trust in

(1) 3 L.B.R., 200. | (2) (1893) I.L.R. 16 All., 88.

1911.

WONG YONE MAIN v. KING-EMPEROR.

respect of deposits or loans made by customers of the Bank. But from the observations of Sir John Edge at page 94, it would appear that he was of opinion that because the money deposited but the customers became the property of the Bank, the Bank did not hold the money in trust for the depositors; but that the Directors held the money in trust for the Bank: the case would be therefore an authority to show that if there was a loan there was no trust. I set aside the conviction and sentence and direct that the bail bonds be delivered up to be cancelled.

Criminal Revision No. 351A of 1911.

January 5th, 1912.

Before Mr. Justice Twomey.

KING-EMPEROR *v.* KYA SONE.

Illegal gratification—offence lawfully compoundable—Section 62, Burma Forest Act—Section 214, Indian Penal Code.

A offered money to B, a forest subordinate, in consideration of his not proceeding against A for a forest offence which was compoundable by a superior forest officer under the Forest Act.

Held,—that no offence was committed by A under section 214, Indian Penal Code.

The accused had a license under the Burma Forest Act for one saw-pit but worked two saw-pits. A forester discovered this breach of the Forest Rules and told the accused that he would be prosecuted for it. The accused thereupon offered Rs. 5 to the forester as consideration for not proceeding further with the case. For this the accused has been fined Rs. 50 under the Indian Penal Code, section 214 (last paragraph) by the 2nd Class Township Magistrate, Hlaingbwè.

The Township Magistrate and the District Magistrate (who examined the case in revision) overlooked the explanation to section 214 and the provisions of section 62, Burma Forest Act. The Forest offence committed by the accused was compoundable under the latter section, and the offering of the sum of Rs. 5 was therefore not an offence under section 214 of the Indian Penal Code.

It is true that the subordinate to whom the offer was made was not empowered to compound the offence. But that makes no difference. Instead of instituting a prosecution, he should have returned the money and informed the accused as to what forest officers are empowered to compound forest offences.

No one appears in support of the conviction though the District Magistrate was asked to give notice to the Conservator of Forests in order that the Government Advocate might be instructed to appear in support of the conviction and sentence if that course was considered necessary.

The conviction and sentence are set aside. The fine will be refunded.

Before Mr. Justice Hartnoll.

Criminal Revision No. 3B of 1912.

January 13th, 1912.

SAN TIN *v.* KING-EMPEROR.

Order directing enquiry into any offence referred to in section 195, Code of Criminal Procedure—Consequences following upon the setting aside of such order—Lapse of proceedings taken under section 476 (2), Code of Criminal Procedure—Sections 185, 423, 439, 476 (1), 476 (2), Code of Criminal Procedure.

It is only just and proper that, if an order directing an enquiry into any offence referred to in section 195, Code of Criminal Procedure, under sub-section (*1*) of section 476, Code of Criminal Procedure, is set aside, any proceedings taken under sub-section (2) of the same section should also cease.

Nur Mahomed v. *Aung Gyi*, 3 L.B.R., 234, referred to.

I have gone through the different proceedings and agree with the learned Sessions Judge that there is ground for revising the Magistrate's order, which was passed under section 476 of the Code of Criminal Procedure. That this Court has the power to revise such an order was laid down in the case of *Nur Mahomed* v. *Aung Gyi* (1). The Magistrate *to whom the case was sent* has proceeded under section 476 (*2*) and so the further question arises as to whether, if the order passed under section 476 (*1*) is set aside, this Court can stop the proceedings of the Magistrate acting under section 476 (*2*). Section 439 of the Code gives this Court power when acting in revision to exercise the powers conferred on a Court of appeal by section 423, and clause (*1*) (*d*) of that section gives the power to make any consequential order that may be just or proper. It seems to be only just and proper that, if an order under section 476 (*1*) is set aside, the proceedings under section 476 (*2*) shall also cease. To allow them to proceed would render of no avail an order cancelling an order under section 476 (*1*) and would permit a trial to be brought to a conclusion for proceeding with which it has been ruled that no grounds exist. Furthermore the order under section 476 (*1*) having been set aside, no material exists on which proceedings under section 476 (*2*) can be based.

I therefore set aside the order of the Subdivisional Magistrate, Prome, sending the case of Maung San Tin for trial to the Court of the Second Additional Magistrate, Prome, under section 193 of the Indian Penal Code, and I further direct the proceedings now being taken against Maung San Tin by the Second Additional Magistrate cease and that Maung San Tin be discharged of the charge laid against him.

(1) 3 L.B.R., 234.

Criminal Revision No. 191B of 1911.

August 10th, 1911.

Before Mr. Justice Twomey.

PO HLAING *v.* BA E.

Kyaw Din—for applicant. | *Dawson*—for respondent.

False charge of offence—Police enquiry—Magisterial enquiry—Necessity of Magistrate's sanction—Section 211, Indian Penal Code—Section 195, Code of Criminal Procedure.

A complained to the police of the Maubin District that B was in illegal possession of a horse which he alleged to be stolen. The case was classed as false. While the police proceedings were pending, A preferred a complaint against B before a Magistrate in the Pegu District of receiving stolen property. The Magistrate discharged B.

Meanwhile B filed a complaint against A under sections 211 and 384 in a Maubin Magistrate's Court, the charge under section 211 being founded on A's complaint to the Maubin police. The Magistrate framed a charge against A.

On appeal against this Magistrate's decision that the Magistrate's sanction under section 195, Code of Criminal Procedure, was unnecessary, it was held that sanction is required when the prosecution under section 211 is instituted after magisterial proceedings have followed police proceedings in the same matter.

Putiram Ruidas v. *Mahomed Kasem*, 3 C.W.N. 33, referred to.

Maung Po Hlaing of Ledaunggan, Pegu District, complained to the Maubin police that he found a pony which he had lost in the possession of Maung Ba E, a pleader of Maubin, and the police accordingly took cognizance of an offence of theft against Ba E. It was then ascertained that Ba E had bought the pony openly from another man who called himself Po Hlaing. The District Superintendent of Police reported the case as false and the District Magistrate agreed in this opinion.

Before the police investigation at Maubin was finished the complainant, Po Hlaing, had left Maubin and on 14th July 1910 preferred a complaint of receiving stolen property, an offence under section 411, Indian Penal Code, against Ba E in the Dabein Subdivisional Magistrate's Court. Ba E was summoned to Dabein but the Subdivisional Magistrate discharged him believing his statement that he bought the pony publicly. The Subdivisional Magistrate expressed no opinion as to Po Hlaing's *bonâ fides* in preferring the complaint.

Meanwhile on 17th September 1910 Ba E had filed a complaint against Po Hlaing under sections 211 and 384 of the Indian Penal Code in the Maubin Headquarters Magistrate's Court. Evidence was recorded and Po Hlaing was eventually charged under section 211 of the Indian Penal Code. It was not till after the charge was framed that objection was taken to the trying Magistrate's proceedings on the ground that the prosecution required the sanction of the Subdivisional Magistrate, Dabein, under section 195 of the Code of Criminal Procedure. The Headquarters Magistrate, Maubin, held that such sanction was unnecessary, because (1) the prosecution of Ba E at Dabein ended before the prosecution of Po Hlaing at Maubin began and

(2) because the District Superintendent of Police and District Magistrate, Maubin, concurred in ordering the prosecution of Po Hlaing under section 211 of the Indian Penal Code. The first is no reason at all and the second is not a good one.

It is idle to contend that the prosecution of Po Hlaing under section 211 of the Indian Penal Code was merely in respect of a false charge made to the Maubin police. The Dabein Magistrate took cognizance after the police investigation at Maubin. The offence complained of had therefore become "an offence in relation to a proceeding in Court" and section 195 (*b*) of the the Code of Criminal Procedure applied to it. The fact that Po Hlaing had previously made a similar complaint to the police of another district is immaterial.

I put the following case to the learned Counsel for the respondent. A woman X lay a charge of rape against A at the police station. The police after investigation report the charge as false and it is struck off. Subsequently X complains to the Magistrate who after full enquiry discharges the accused A. If A could then prosecute X without first obtaining the Magistrate's sanction, the provisions of section 195 of the Code of Criminal Procedure would be rendered nugatory to a great extent. It is clear I think that A would have to obtain the Magistrate's sanction and could not prosecute X merely for the false charge she had brought to the police. The present case is not essentially distinguishable from the hypothetical case which I have supposed.

It would no doubt have been different if the prosecution under section 211 had already commenced before Po Hlaing complained to the Dabein Magistrate. The Dabein proceedings would not in that case affect the power of the Maubin Magistrate to finish trying the offence of which he had already taken cognizance. This is clear from the ruling in *Puliram Ruidas* v. *Mahomed Kasem* (1) cited by the learned Counsel for the respondent. But that ruling is no authority for the view that sanction is unnecessary when the prosecution under section 211 is instituted *after* the Magisterial proceedings (as in the present case).

I think that the sanction of the Dabein Subdivisional Magistrate or of the District Magistrate, Pegu, was necessary for Po Hlaing's prosecution under section 211 of the Indian Penal Code.

But seeing that the objection was not raised till a very late stage of the prosecution, I think that Ba E should now be given an opportunity of obtaining the requisite sanction.

I direct that the prosecution of Po Hlaing shall be stayed for six weeks or until such earlier date as the requisite sanction may be obtained by the respondent Ba E from the Subdivisional Magistrate, Dabein, or the District Magistrate, Pegu. If sanction is obtained the trial of Po Hlaing should proceed from the point where it left off, the previous proceedings holding good.

(1) 3 C.W.N., 33.

Civil 1st Appeal No. 157 of 1909.

September 23rd, 1911.

Before Mr. Justice Hartnoll and Mr. Justice Twomey.

1. SEIN HNYIN
2. HPO HLA

Minors by their Guardian *ad-litem* DOE MA.

Legal representatives of U THA MAUNG (deceased).

v.

C. S. LUTCHMAN CHETTY.

Hamlyn—for Appellants (defendants).

J. R. Das—for Respondent (plaintiff).

Legal representatives—Minors—Order 22, Rule 3, Code of Civil Procedure, 1908—Section 6 (1), Indian Limitation Act, 1908.

The application of one legal representative of a deceased plaintiff to be made a party under Rule 3 of Order 22, Code of Civil Procedure should be entertained, even if all the legal representatives have not so applied, though, where possible, all legal representatives should apply. When such legal representative is a minor, the application is valid, if made during the period of minority.

Bhikaji Ramchandra v. *Purshotam* (1885), I.L.R., 10 Bom., 220, referred to.

Phoolbas Koonwur v. *Lalla Jogeshur Sahoy* (1876), I.L.R., 1 Cal., 226, followed.

The point for decision in this appeal is whether Ma Sein Hnyin and Maung Hpo Hla should be placed on the record as the legal representatives of their deceased father, Maung Tha Maung, and the appeal should be orderd to proceed. Ma Sein Hnyin and Maung Hpo Hla are minors and, though Maung Tha Maung died on the 13th December last and more than six months elapsed before any application was made on their behalf to be made parties, they claim that under section 6 (*1*) of the Limitation Act they are entitled to be made parties. In support of their contention the case of *Bhikaji Ramchandra* v. *Purshotam* (1) is quoted. Order 22, Rule 3, in our opinion should not be construed to mean that no application should be entertained unless it is made by all the legal representatives of the deceased. This would sometimes be impossible especially within the prescribed time. Where possible all the legal representatives should so apply ; but an application by a legal representative is sufficient for him to be made a party. In the present instance by virtue of section 6 (*1*) of the Limitation Act, the minors are within time. It is settled by the case of *Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy* (*2*) that application by minors are valid, if made during the period of their minority. We accordingly set aside the order of abatement and direct that Ma Sein Hnyin and Maung Hpo Hla be placed on the record as the legal representatives of their deceased father, Maung Tha Maung, and that their mother, Ma Doe Ma, be appointed as their guardian to represent them in the appeal.

(1) 1885, I.L.R., 10 Bom., 220. | (2) 1876, I.L.R., 1 Cal., 226 at p. 243.

Full Bench.

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, and Mr. Justice Twomey.

Civil Reference No. 1 of 1911.

January 31st, 1912

YIN ZA *alias* MRS. NASH *v.* C. NASH.

Lentaigne—for Plaintiff.

Divorce—Desertion—Abandonment—Meaning of the terms—Consideration of circumstances leading to application for divorce, Section 47, Indian Divorce Act, 1868.

Although it has in some cases been held in the English Court for Divorce and Matrimonial cases that abandonment against the wish of the person charging it must be contrary to the actively expressed wish of such party and notwithstanding the resistance and opposition of such person, yet this rule is not one to be follwed in all cases. The circumstances of each case and the conduct of the parties must be carefully weighed and considered in determining whether there has been desertion.

Fowle v. *Fowle* (1878) I.L.R., 4 Cal., 260; *Graves* v. *Graves* (1864), 33 L.J. Reports (Pro., Matrimonial and Admiralty), 66; *Pizzala* v. *Pizzala*, (1896) 12 Times L.R., 451; referred to.

Fox, C. J.—The suit was brought by the wife for dissolution of her marriage on the ground of her husband's adultery coupled with desertion, without resonable excuse for two years and upwards.

The husband admitted adultery, and the only matter in dispute was the alleged desertion without reasonable excuse.

Desertion in the Indian Divorce Act implies an abandonment against the wish of the person charging it. Under section 7 of the Act the Courts have to act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England acts and gives relief.

In some cases that Court has construed abandonment against the wish of the person charging it as meaning contrary to the actively expressed wish of such party and notwithstanding the resistance and opposition of such person—see *Fowle* v. *Fowle* (1). The present case however does not appear to me to be one in which such rule should be applied, especially as it is not a universal rule—see *Graves* v. *Graves* (2) and *Pizzala* v. *Pizzala* (3).

The parties were married in 1898. They had cohabited previously and the plaintiff had had two children by the defendant. They lived together at Tavoy until August, 1904, when the plaintiff says she was persuaded by the defendant to go to Moulmein. While there she heard that the defendant was carrying on illicit intercourse with a woman. She returned to Tavoy with her children towards the end of the year. In January 1905

(1). (1878), I L.R., 4 Cal., 260.
(2). (1864), 33 L.J. Reports (Pro., Matrimonial and Admiralty), 66.
(3). (1896), 12 Times L. R., 451.

1912.

YIN ZA *alias* MRS. NASH. *v.* C. NASH.

she says he turned her out of the house, having while she was there, gone habitually to the place where the woman with whom the defendant admits having committed adultery lived. A witness who was an interpreter and quasi-intermediary between them says that the plaintiff was at this time willing to live apart and she accepted a sum of Rs. 300 to repair her mother's house in Tavoy and went and lived there at first. The defendant brought his mistress to live with him in his house, and they have lived together continuously. According to the arrangement then made between them the defendant was to pay for the schooling of the plaintiff's children and to pay her an allowance of Rs. 27 a month. This he did until some time in 1907. When his payments to her fell into arrears she took steps to see him again and the outcome of their interviews was that he paid her Rs. 170 and each signed a document in the following terms.

"I hereby renounce all rights over Ma Yin Za (Mrs. Nash) as my wife, or any property now in her possession, or which may hereafter be possessed by her.

I hereby renounce all claims to support from Mr. C. Nash, as my husband and to any property now in his possession or which may hereafter be possessed by him."

She does not know English, but she admits that the document was explained to her in Burmese. She says however she was so distressed as to be almost mad at the time and did not understand it. The witness Gallope's memory as to what happend in connection with the document is not clear, but it is clear that she wanted her allowance to continue although she understood that the document she was signing was a letter of divorce. The document was composed and written by the defendant himself and her signature to it was evidently wrung from her. It is scarcely necessary to say that the parties could not dissolve their marriage or their relationship by such a document, even if the plaintiff had fully understood the document and had consented to its terms. The conduct of the defendant in asking his wife to sign such a document was shameful and degrading to his nationality. There can be no doubt that he intended to abandon her, and the only question is whether his subsequent abandonment of her was against her wish.

Gallope said that at a meeting of the parties at his house she said that as scandal was being talked in the town it would be better for them either to re-unite or have a divorce and separate. Even if she did say this it must be taken in connection with what had happened before and the circumstances at the time. She undoubtedly resented his adultery from the first, and was justified in keeping away from him and not seeking a return to cohabitation as long as he kept up his liaison with his mistress and had her living in the house with him. He showed no sign of parting with the mistress, and it would not be reasonable to expect of any woman to express a wish to return to cohabitation with a husband who had so distinctly shown his intention to adhere to his adulterous life. Her want of desire to return to

1912.

YIN ZA *alias* MRS. NASH. *v.* C. NASH.

cohabitation was entirely brought about by her husband's gross conduct towards her.

Under the circumstances his adultery and entire abandonment of her since the date of the document entitled her in my opinion to a decree for divorce, and I would confirm the decree.

The case will go back to the Divisional Court for determination of the amount of alimony which should be awarded to the plaintiff.

The defendant will pay the plaintiff's costs of the proceeding in this Court, 5 gold mohurs allowed as advocate's fee.

Hartnoll, J.—I concur.

Twomey, J.—I concur.

Civil Miscellaneous Appeal, No. 125 of 1910.

March 11th, 1912.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

K. M. T. T. SHANMUGAM CHETTY. *v.* { 1. C. T. A. ANNAMALAY CHETTY. 2. A. R. S. SATHAPPA CHETTY.

J.C.R. Dass—for Appellant.

McDonnell—for Respondents.

Dissolution of partnership—Reference to arbitration—Order of adjustment—2nd Schedule, Civil Procedure Code, 1908—Order 23, Rule 3, Civil Procedure Code, 1908.

A sued B and C for dissolution of partnership. They referred the matters in dispute to arbitration. On A asking for time to file the award the Judge passed a decree in Form 21, Appendix D, Civil Procedure Code, with modifications, on the ground that a reference to arbitration was made without the leave of the Court. Later A applied for an order of adjustment under the provisions of Order 23, Rule 3, Code of Civil Procedure. This application was dismissed. On appeal it was held that the question as to whether an order of adjustment should be made must be decided by a consideration of the terms and meaning of Order 23, Rule 3 apart from a consideration of the provisions of the Code which relate to arbitration. If it was proved that B and C did agree to refer the matters in dispute to arbitration and did subsequently accept the award of the arbitators, A's application for an order of adjustment should not have been dismissed.

Pragdas Sagurmalt v *Girdhardas Mathuradas* (1901), I.L.R., 26 Bom., 76 ; *Ghulam Hkan* v *Muhammad Hassan* (1901), I.L.R., 29 Cal., 167 ; *Tincowry Dey* v. *Fakir Chand Dey* (1902), I.L.R., 30 Cal. 218 referred to.

Rukhanbai v. *Adamji Shaik Rajbhai* (1908), I.L.R., 33 Bom., 69, followed.

Hartnoll, J.—C. T. A. Annamalay Chetty sued K. M. T. T. Shanmugam Chetty and A. R. S. Sathappa Chetty for dissolution of partnership and the other usual reliefs consequent on such a decree being passed. In the course of the suit and without any reference to the Court the parties referred the matters in dispute to arbitration on the 27th April 1910. The arbitrators duly made an award on the 23rd May 1910. From the 29th April 1910 adjournments were given by the Court as there was a prospect of settlement. On June 14th Shanmugam's counsel presented an

1912.

K. M. T. T. SHANMUGAM CHETTY
v.
I. C. T. A. ANNAMALAY CHETTY.
2. A. R. S. SATHAPPA CHETTY.

application stating that the case had been referred to arbitration, and that an award had been passed, and asking for time to file the ward for a decree in accordance with its terms. The Judge noted that Annamalay's counsel admitted that there was an award but objected to its being filed because the matter was referred to arbitration without the leave of the Court as required by the provisions of the Second Schedule of the Civil Procedure Code. Sathappa's counsel also objected on the same ground. The learned Judge allowed the objections and ordered a preliminary decree to be drawn up in the terms of Form 21, Appendix D to the Code with certain modifications. Then on July 1st an application was made by Shanmugam for an order of adjustment under the provisions of Order 23, Rule 3 of the First Schedule to the Civil Procedure Code. The application set out that the parties had referred the matters in dispute to arbitration, that such were finally settled by an award of the 23rd May, that Shanmugan had complied with the award by handing over to the arbitrators all the documents, jewelry and other properties which the other parties were entitled to receive in accordance with its terms except a sum of Rs. 2,600 which was by the award to be paid on the 23rd June, and that the arbitrators had handed over to the other parties whatever Shanmugam had handed over to them, that this took place on the 23rd and 24th May and that before and on the 23rd June, Shanmugam had offered to pay the Rs. 2,600 to the other parties who had refused to accept it. The learned Judge heard counsel on the application and dismissed it. From that order of dismissal this appeal has been laid. It was objected at the hearing that the order that should have been appealed from was the order of the 14th June which directed the drawing up of a preliminary decree and so that this appeal does not lie. The order directing the drawing up of the preliminary decree was not based on a consideration of any application under Order 23, Rule 3. The application then before the Court was for time to file an award, which application was objected to. I am not prepared to hold that it was not within the power of the appellant to file an application for an adjustment under Order 23, Rule 3, subsequent to the order directing the drawing up of the preliminary decree and if it was within his power it had to be adjudicated on and an appeal would lie from such adjudication. I cannot therefore hold that this appeal does not lie.

In order to assist us to arrive at a decision as to whether an order of adjustment should be made under Order 23, Rule 3, the following cases were brought to our notice. *Pragdas Sagurmall* v. *Girdhardas Mathurdas* (1), *Ghulam Hkan* v. *Muhammad Hassan* (2), *Tincowry Dey* v. *Fakir Chand Dey* (3) *and Rukhanbai* v. *Adamji Shaik Rajbhai* (4). It seems to me that the matter must be decided on a consideration of the terms and meaning of Order 23, Rule 3, apart from a consideration of

(1) (1901) I.L.R., 26 Bom., 76.
(2) (1901) I.L.R., 29 Cal., 167.
(3) (1902) I.L.R., 30 Cal., 218.
(4) (1908) I.L.R., 33 Bom., 69.

1912.

K. M. T. T. SHANMUGAM CHETTY v. I. C. T. A. ANNAMALAY CHETTY. 2. A. R. S. SATHAPPA CHETTY.

the provisions of the Code which relate to references to arbitration. It is not asked now that any of the provisions relating to arbitration be applied. Order 23, Rule 3, is as follows : — "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement of compromise the Court shall order such agreement, compromise, or satisfacion to be recorded and shall pass a decree in accordance therewith so far as relates to the suit." Now the agreement to refer the matters in dispute to arbitration certainly did not finally settle the suit. It only was a means towards that end. Again the award following on the agreement to my mind did not adjust the suit within the meaning of Order 23, Rule 3. Taken by itself it was merely an award by arbitrators and not an agreement between the parties. Taken in conjunction with the agreement it cannot be said to form an agreement between the parties. It was certainly open to any of the parties to refuse to be bound by the award for any good reason such as corruption and misconduct of the arbitrators. But, if the parties did accept the award, then I think that such acceptance would come within the meaning of Order 23, Rule 3. The acceptance by the parties of the award would mean that they agreed to be bound by its terms, or that they agreed to compromise in accordance with its terms. This view is in accordance with that of *Beaman, J.* in the case of *Rukhanbai* v. *Adamji* (4). The appellant alleges here that the respondents did accept and agree to the award. Whether they did or not has not been enquired into.

I would therefore fix the following issue.

"Did respondents agree to refer the matters in dispute to arbitration and did they subsequently accept the award of the arbitrators"?

This issue should be tried and a finding on it should be recorded by the District Judge and the proceedings with his finding thereon should be resubmitted to this Court in due course.

Fox, C.J.—I concur.

Before Mr. Justice Hartnoll.

SUBRAMANYAM CHETTY *v.* KING-EMPEROR.

Criminal Revision No. 52B of 1912.

April 26th, 1912

Hay—for Applicant.

Absconder from justice—Police seizure of property—institution of Suit—Attachment and sale—Conflicting claims of Government and plaintiff—Priority of accrual of Right—Sections 87, 88, 435, 439, Code of Criminal Procedure—Sections 25, 26, Police Act—Order XXI, Rule 52, Code of Civil Procedure.

A and B absconded after A's house had been searched and opium found. Their property was seized by the police. Later C instituted a suit against A and B and in the course of the proceedings on the 9th September obtained an order of attachment on the District Magistrate and District Superintendent of Police under Order XXI, Rule 52 of the Civil Procedure Code with regard to the property seized by the police. The District Magistrate noted on

1912.

SUBRAMANYAM CHETTY v. KING-EMPEROR.

the order that none of the property was to be touched until the Government claims were first satisfied. C obtained his decree on 27th September and on the 4th October C applied for proclamation and sale of the attached property. The Subdivisional Judge refused to take action until the matter had been settled by the District Magistrate. On the 5th October C moved the District Magistrate to withdraw his objection to the attachment and sale of the goods. The District Magistrate refused to do so on the ground that the claims of Government must be safeguarded. On 25th September proceedings were taken before the 2nd Additional Magistrate to take evidence under section 512 and action under sections 87 and 88, Criminal Procedure Code, against A and B. No action was taken under sections 87 and 88 until 4th December when proclamation and warrants of attachment were ordered to be issued. It was not till the 19th February that the proclamation was declared to have been duly published on 17th January and that the properties attached were declared to be at the disposal of Government.

Held,—that at the time of attachment and application for sale in the Civil Court no action had been taken under sections 87 and 88, Criminal Procedure Code and so no rights had accrued to Government under section 88 (7), whereas when C applied for sale he had established a right to have the right title and interest of the judgment debtors sold by the Civil Court.

The order of the District Magistrate of 5th October was accordingly set aside and it was directed that on the application of the Subdivisional Court the Distict Magistrate do hand over the goods attached by that Court to that Court for disposal.

From the papers before me it appears that the house of one Tin Ngan was searched on the 29th August 1911 and a large quantity of opium found. In connection with the finding of this opium Tin Ngan and one Sit Hpaw absconded and certain property said to belong to them was seized by the police. On the 2nd September 1911 V. M. R. P. Subramanyam Chetty instituted a suit in the Subdivisional Court, Bassein, against Thonbon and Chim to recover Rs. 1,000 due on a promissory note. These persons seem to be the same as Tin Ngan and Sit Hpaw. Subramanyam obtained his decree on the 27th September. On the 2nd September he applied for an attachment before judgment of Thonbon's and Chim's property saying that the police had taken charge of this property as ownerless property and might confiscate the same as ownerless property. An 'ad interim' attachment was ordered to issue. The attachment referred to certain moveable property. On the back of the attachment order the District Magistrate noted: "This property is at present in the custody of the police in a criminal case. It may have to be confiscated to Government later on. The house is not to be opened on any account. If the Chetty has any claims they may be considered when the Government claims have all been fully satisfied." Subsequently an order of attachment was issued on the District Magistrate and District Superintendent of Police on the 9th September under Order 21, Rule 52 of the Civil Procedure Code. On the back of this order of attachment is a note by District Magistrate to the District Superintendent of Police as follows:—"None of this property is to be touched until the Government claim is first satisfied." On the 4th October Subramanyam Chetty applied for proclamation and sale of the attached property. The Subdivisional Judge refused to take action until the matter had

been settled by the District Magistrate or between the District Magistrate and Subramanyam. The latter laid an appeal against this order before the Divisional Court. This appeal is still pending. On the 23rd November Subramanyam filed an application before the Sessions Judge setting forth the facts and asking that the District Magistrate be asked not to obstruct the process of the Subdivisional Judge's Court and to act in accordance with the provisions of the Civil Procedure Code. On the 25th September proceedings were taken before the 2nd Additional Magistrate, Bassein, to record evidence under section 512, Criminal Procedure Code, and to take action under sections 87 and 88 of the same Code. No action was taken under sections 87 and 88 until the 4th December, when proclamation and warrants of attachment were ordered to be issued. The warrants of attachment were not returned until the 8th January when it was stated that the properties had been seized by the police and were in their custody and that the bailiff had a list of them. Sufficient time was not allowed in the first proclamation and so a fresh one was ordered to issue on the 16th January. It was on the 19th February declared to have been duly published on the 17th January and on that date the properties attached were declared to be at the disposal of Government. The learned Sessions Judge has reported the matter for the orders of this Court. Notice was issued on Subramanyam and the District Magistrate of the day fixed for hearing the matter. Subramanyam appeared by Counsel, but the District Magistrate entered no appearance. I should also add that on the 5th October Subramanyam made an application to the District Magistrate setting out the facts and *inter alia* mentioning the attachment by the Subdivisional Court and saying as follows :—" That petitioner was informed by the Subdivisional Judge that your Honour objected to the attachment and sale of the goods and therefore refused to proclaim the said attached goods to be sold in execution of the decree obtained by petitioner against the said Thonbon and Chim. Your Honour knows that no offence was committed by the said absconders with reference to the said goods and the police only took charge of them and reported the matter to you because the owners were absent. The relief asked was that the District Magistrate might be good enough to withdraw his objection and obstruction to the attachment and sale of the goods, or that if he had no beheif of Government still claims to have an interest in the property superior to that of the applicant he would agree to the sale of the goods pending the decision by a proper tribunal as to the respective rights of Government and applicant to the money. The order passed by the District Magistrate was that he could not accede to the request as the claims of Government must be safeguarded. The first point seems to be whether this Court can interfere in revision on the Criminal Side as it has been asked to do. The application of the 5th October before the District Magistrate and the order passed thereon seems to

1912.

SUBRAMANYAM CHETTY v. KING-EMPEROR.

me to consitiute a proceeding within the meaning of sections 435 and 439 of the Criminal Procedure Code and I am of opinion therefore that this Court can interfere in revision. The seizure of the property of the absconders would appear to come under the provisions of section 25 of the Police Act. It has clearly been detained by the orders of the District Magistrate though no proclamation has been issued under section 26. At the time of the attachment and application for sale no action had been taken under the provisions of sections 87 and 88 of the Criminal Procedure Code and so no rights had accrued to Government under the provisions of section 88 (7). On the other hand Subramanyam had, when he applied for sale of the goods, established a right to have the right, title and interest of the judgment-debtors, or the absconders, in them sold by the Civil Court. I think that this is such a claim as is contemplated by section 26 of the Police Act. As Government had established no right to them on the 5th October I think that the order passed by the District Magistrate on that date is incorrect. It may be argued that subsequent to that date—that is the 19th February—Government had established its right to them which establishment should be allowed to override Subramanyam's claim : but in my opinion to allow this, this would be unfair and inequitable, for if the goods had been sold in October by process of the Civil Court and the proceeds drawn out by Subramanyam there would have been nothing in December to attach under section 88. As Government had no right to the goods on the 5th October and as on that date Subramanyam had established a certain right over them I am of opinion that the order of the District Magistrate then passed was wrong and that the order to be passed now should be the order that should have been passed then. I accordingly set aside the order of the District Magistrate of the 5th October and direct that on the application of the Subdivisional Court he do hand over the goods attached by that Court to that Court for disposal.

Before Sir Charles Fox, Chief Judge.

DAR BUX *v.* DAN MEAH.

Civil Revision No. 74 of 1907.

M. Israil Khan—for applicant (defendant).

K.B. Banurji—for the respondent (plaintiff).

November 11th, 1907.

Oath—administration of oaths out of Court—procedure to be followed—section 10, Indian Oaths Act, 1873.

If parties to a suit agree to be bound by an oath taken out of Court, a commission should issue under section 10, Indian Oaths Act. 1873. to administer it and to take the evidence of the person sworn. In default of this procedure no basis for a decree exists.

The defendant offered to be bound by the oath of the plaintiff on the Koran and taken in the mosque that the plaintiff had deposited with him the amounts he claimed. The parties proceeded to the mosque where the plaintiff asked the defendant to hand him the Koran. The defendant refused to do this. On the following

morning the plaintiff went with a Court peon to the mosque, and in the absence of the defendant made oath on the Koran.

There is nothing to show what he said after taking the oath, and consequently their was no basis for a decree.

If the oath is taken out of Court, a commission should issue under section 10 of the Oaths Act to administer it, and to take the evidence of the person sworn.

The decree is set aside, and the case must be re-heard.

1907.

DAR BUX
v.
DAN MEAH

Before Mr. Justice Twomey.

V.C. DURAI RAJAH MUDALIAR *v.* M. R. VADIVELU.

Civil Revision No. 143 of 1911.

December 18th, 1911.

D.M. Karaka—for appellant.

Arrest of defendant—committal to prison—release—re-arrest—cost of clothing and bedding—subsistence allowance—section 33, Prisons Act, 1894—section 58, Code of Civil Procedure.

A was committed to prison for six months in execution of B's money decree and was released after eleven days as B has not complied, under section 33, Prisons Act, 1894, with the written demand for the cost of clothing and bedding supplied by the jail. Subsequently it was discovered that this demand had not reached B.

A was re-arrested.

Held,—that the cost of clothing and bedding is not "subsistence allowance" as contemplated in section 58 of the Code of Civil Procedure, and as there had been no default on the part of B under section 33, Prisons Act, A was rightly re-arrested in spite of the analogy of sub-section (2) of section 58 of the Code of Civil Procedure.

Shamji v. Poonja, (1902) I.L.R. 26 Bom., 652, referred to.

The petitioner was arrested in execution of the respondent's money decree and was committed to prison for six months on 1st August 1911. He was released by the Jail authorities on 12th August, because the respondent had not paid the cost of clothing and bedding supplied to the petitioner in Jail. Subsequently it was discovered that the written demand sent to the respondent under section 33, Prisons Act, 1894, had been despatched to a wrong address and did not reach the respondent till four days after the petitioner's release. The Small Cause Court in these circumstances has ordered the petitioner to be re-arrested at the instance of the respondent. The petitioner contends that the Court had no power to order re-arrest.

The Judge of the lower Court has held that the cost of clothing, etc., payable under section 33, Prisons Act, is not "subsistence allowance" as contemplated in section 58 of the Code of Civil Procedure. I think this view is right. The subsistence allowance referred to in section 58 is the monthly allowance fixed by scale under section 57 and it includes nothing else. At the same time if there had really been a default of payment of the cost of clothing, etc., under section 33, Prisons Act, it could probably be urged with good reason that on the analogy of section 58 (2), Code of Civil Procedure, the judgment-debtor having been released owing to the decree-holder's default there should be no

1911.

V.C. DURAI RAJAH MUDALIAR v. M. R. VADIVELU.

liability to re-arrest. But in the present case there has been no default. Section 33, Prisons Act, requires the decree-holder to pay the cost of clothing, etc., "within 48 hours after the receipt by him of a demand in writing." As the respondent did not receive the demand, he could not comply with it. Thus the petitioner was released owing to a mistake of the Jail authorities and not owing to any default of the decree-holder under section 33, Prisons Act. There is no authority for holding that a civil prisoner released in such circumstances cannot be re-arrested. It was pointed out in the Bombay case, *Shamji* v. *Poonja* (1), that the only prohibition on a scond arrest expressed in the Code was that in section 341 [Code of 1882 corresponding with section 58 (2) of the present Code] and this prohibition is limited to the cases there enumerated. The case of a debtor whom the Jail authorities have released by mistake is not governed by section 58 (2) at all.

I therefore think that the learned Judge's order is correct. But as in the Bombay case, the new warrant should have a memorandum thereon that in calculating the six months after which the defendant must be released the time (eleven days) he suffered imprisonment under the former warrant is to be taken into consideration.

The application for revision is dismissed.

Full Bench—(Criminal Reference).

February 23rd, 1912.

Before Sir Charles Fox, Chief Judge, Mr Justice Hartnoll, Mr. Justice Ormond, Mr. Justice Robinson and Mr. Justice Parlett.

IN RE PO SEIK *v.* KING-EMPEROR.

Dawson—for Po Seik.

McDonnell—for King-Emperor.

Criminal Breach of Trust—constituents of a trust—differentiation between Trusts and Loans—section 405, Indian Penal Code.

A was convicted of criminal breach of trust in respect of money advanced to him by B for the purpose of buying paddy and selling it to B. B took from A promissory notes payable on demand for the amount advanced and a document by which A undertook to use the amount for no other purpose than the purchase of paddy.

The following reference was made to a Full Bench under section 11 of the Lower Burma Courts Acts.

On the facts proved and admitted as to the agreement that was entered into by A and B and which are admissible in evidence, was there an entrustment of property within the meaning of section 405 of the Indian Penal Code to A [illegible]?

It was held (Hartnoll, J., dissenting) that there was no entrustment of property to A within the meaning of section 405 of the Indian Penal Code.

(1) (1902) I.L.R. 26 Bom., 652.

Wong Yone Main v. *King-Emperor* (Criminal Appeal No. 631 of 1911), 6 L. B. R. 46, confirmed, *Tha Po* v. *King Emperor*, 3 L. B. R., 200 ; *J. Reid* v. *So Hlaing*, 5 L. B. R., 241 ; *Reg.* v. *Townshend*, (1884) 15 Cox's Cr. C., 466 ; *Phillips* v. *Huth*, 6 M. and W., 572 ; *Hatfield* v. *Phillips*, 9 M. and W., 647 ; *Maung Pwa Gyi* v. *Queen-Empress*, (1893) 2 Bur. L. R., 9 ; *Queen Empress* v. *Moss*, (1893) I. L. R. 16 All., 88 ; referred to.

1912.

IN RE PO SEIK v. KING-EMPEROR.

February 23rd, 1912.

The following reference was made to a Full Bench by Mr. Justic Hartnoll :—

The appellant Maung Po Seik was charged by the Societa Anonima Coloniale di Trieste with criminal breach of trust, and has been convicted under section 405 of the Indian Penal Code and sentenced to undergo nine months' rigorous imprisonment. At the hearing of the appeal a preliminary point was raised and that is that appellant's agreement with the complainant company was such that there was no trust breated within the meaning of section 405 of the Indian Penal Code and so that there could be no breech of trust, and consequently no conviction for criminal breach of trust. My attention was drawn to the recent case of *Wong Yong Min* v. *King-Emperor* (Criminal Appeal No. 631 of 1911) (1) which was decided by my learned colleague Mr. Justice Ormond and which was stated and seems to be a precisely similar case to the present one. In that case it was held that there was no trust and the appellant was acquitted. The authorities quoted in that case were again quoted before me.

It is prove and admitted that on the 21st March last the complainant company advanced Rs. 10 000 to the appellant, who at the time signed an undertaking in the following form :

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" In consideration of the sum of Rupees Ten thousand only advanced to me as per promissary note No 86—90, dated the 21st March 1911, I, the undersigned, undertake to buy about 10,000 baskets of sound paddy at Mingladon village and to deliver the same to the Societa Anonima Coloniale di Trieste, at their Dawbong mill within twenty days from date. The value of the paddy to be credited at the ruling market rate for the like paddy on the day of delivery.

I undertake that the above sum of Rs. 10,000 will be use for no other purposes than the purchase of the aboutmentioned 10,000 baskets of paddy.

RANGOON :
HANS POCKTRAGER, *Witness.* ကိုအိုးဆိတ်။"

At the same time he signed five promissory notes for Rs. 2,000 each payable on demand but not bearing interest. It was further

(1) 6 L. B. R., 46.

1912.

IN RE PO SEIK v. KING-EMPEROR.

admitted that if the money or any of it or if paddy bought with such money was lost while it was in the possession of the appellant the loss was to fall on the latter. Again if appellant made losses in purchasing paddy and disposing of it to the complainant company according to the terms of his undertaking he was to bear them, whereas if he made profits he was to enjoy such. It was contended on behalf of the appellant that the undertaking did not create any trust in that the execution of the promissory notes made the transaction merely a loan—that immediately the notes were executed and the money was handed over, the property in the money passed from the complainant company to the appellant. I was asked to consider the legal consequences resulting on the promissory notes being executed—how that the relation of debtor and creditor was established and that the appellant would be liable on them to any holder in due course. It was urged that the undertaking was only one to utilize appellant's own money, and argument was further raised that in the case of a trust a trustee is not liable for loss incurred in the legitimate use of money nor can he enjoy any profits derived from its use. Council for the complainant company urged on the other hand that the undertaking and the promissory notes must be taken into consideration together, that the real position was that the appellant was a trustee and only thehnically a debtor, that he undertook only to expend the money in the purchase of paddy for the company and confidence was reposed in him by the company that he would only so use the money. It was submitted that the undertaking created a trust, that the company could have either sued on the undertaking or on the promissory notes, that the promissory note were only taken for extra security, that, if the company had negotiated the notes and the holder had sued appellant, the latter could have sued the company. It was asked whether if the appellant had sued the money to pay off his own debts the company could not have applied for an injunction to prevent him from doing so.

In my opinion the terms of the undertaking and also the oral agreement, if evidence of such oral agreement is admissible, cannot be ignored in deciding what was the nature of the true contract between the parties, and it would be entirely wrong in determining whether a trust was created or not to proceed on a consideration of the promissory notes only and the legal consequences resulting therefrom. I will first proceed to consider the undertaking and the promissory notes altogether leaving out for the present any consideration of the terms of the oral agreement and their effect. In the undertaking the appellant undertakes that the Rs. 10,000 will be used for no other purpose than in the purchase of paddy for the company. The prommissory notes show that no interest was to be paid on the Rs. 10,000 and this fact alone indicates that the transaction was no ordinary loan. It seems to me to be quite clear that the Rs. 1,0000 were advanced by the company to appellant for the purchase of paddy which was to be

supplied to the company at the current market rate and that the appellant bound himself not to utilize the money in any other manner. The promissory notes were merely taken as extra security for the realization of the money in case it became necessary to take steps for its recovery. Five notes of Rs. 2,000 each were taken so that suits might be brought in the Small Cause Court. This is clear from the evidence of Yeo Kin Sein. Looking at the undertaking and the promissory notes together I am unable to see that the company parted with the entire property in the Rs. 10,000 for they did not give the unrestricted use of it to the appellant. They stipulated that it was to be used for no other purpose than the purchase of paddy for themselves, and this stipulation was acquiesced in by appellant. If a third person knowing of this condition of the agreement between the company and the appellant took the Rs. 10,000 in satisfaction of a debt owing to him by the appellant it seems to me that the company could sue him and recover the money, for it would undoubtedly be a wrongful act for the third person knowing of the condition to have taken the money which was not at the entire disposal of the appellant and which he was bound to use for company's purposes. If I am correct in this view it is an instance to show that the company did not part with the complete property in the money. Therefore looking at the undertaking and the promissory notes by themselves and construing by them the nature of the agreement between the parties, I am of opinion that their effect is to show that there was an entrustment of Rs. 10,000 to the appellant for the purchase of paddy and that they cannot be held to show that the company parted with all dominion over the money advanced.

It now remains to consider the terms of the oral agreement and their effect assuming that evidence of such oral agreement is admissible. The terms were that appellant was to purchase the paddy at such rates as he chose and to supply it to the company at the current market rate in Rangoon bearing all consequent loss or enjoying all consequent profit and that if the money or any of it or paddy purchased with the money was lost while it was in the appellant's possession he was to bear such loss, and so the question arises whether such conditions do not create such a state of affairs that it must be held that the company parted with all dominion over the property and so no trust could be created with respect to it. If the further conditions other than those ascertained by a consideration of the undertaking and promissory notes had been that all legitimate loss of the Rs. 10,000 or part of it or paddy purchased with it should fall on the company I am certainly of opinion that a trust was created. The company would not only have restricted the use of the money but also have further kept its dominion over it by agreeing to bear any legitimate loss that occurred. But it did not. The appellant was to bear such loss. Does this create such a condition that the company must be held to have divested themselves of such dominion over the money that they cannot create a trust with respect to it? One

1912.

IN RE PO SEIK v. KING-EMPEROR.

of the incidents of an entrustment of property is that the person entrusted with it holds it on behalf of another, and he is not liable to account for it if it is lost without culpable negligence on his own part. Here one of the conditions of the contract between the company and the appellant was that the appellant was responsible for loss in any case. This is a condition incompatible with an entrustment and therefore it may be argued that there was no trust. On the other hand it may be said that there was an entrustment at any rate as long as the money and paddy was not lost and that after there was a loss a different state of affairs came in. But the question arises whether it would not be wrong to say that at one period the appellant must be held to have possession in trust and at another not so to hold and whether he must not be considered to have held it in the same character throughout that character being determined from a consideration of the whole contract and its conditions. The position seems to be that one portion of the contract between the parties makes the appellant hold the money in trust for a specific purpose, whereas another portion of it is incompatible with a state of entrustment. The resulting effect and whether it should be held that there exists an entrustment within the meaning of section 405 of the Indian Penal Code seems to me to be a matter of some difficulty to decide. This view of the case was not clearly realized and argued before me and I would prefer not to express any opinion on it at present.

My views as set out above are different to those held by my learned colleague, Mr. Justice Ormond, in what is allowed to be a precisely similar case. Mr. Justice Ormond held that the money was advanced as a loan, pure and simple, which loan was repayable on demand and that the accused undertook to buy paddy with the money and to sell the paddy to the company at the current market rate and that as in the case of a loan the property in the money passes to the borrower there could be no breach of trust in respect of property of which he is the sole owner. In the case of *Tha Po* v. *King-Emperor* (2) the question as to whether a condition that threw on the person taking the advance all loss made any difference in his relation to the person advancing the money was not discussed.

But there is a further aspect of the case that has presented itself to me which is as follows. As I have set out, in my opinion the undertaking and promissory notes taken by themselves show that there was an entrustment to appellant within the meaning of section 405 of the Indian Penal Code. If it be decided that the effect of the additional oral agreement so varies the meaning of the written part of the contract that it must be held that there was no entrustment within the meaning of section 405 of the Indian Penal Code, does not a consideration of the oral part of agreement create a condition of affairs inconsistent with the plain

(2) 3 L.B.R., 200.

1907.

IN RE PO SEIK v. KING-EMPEROR.

meaning of the terms of the undertaking and the promissory notes taken together ? And, if so, should appellant be allowed to produce in evidence at all that part of the contract between him in the company that can only be proved by oral evidence ? In the case of *J. Reid* v. *So Hlaing* (3), it was held that where a party to a written contract institutes a criminal proceeding against another party to such contract which invovles consideration and determination of what the contract between the parties was, no evidence of any oral agreement or statement is admissible in such proceeding for the purpose of contradicting, varying, adding to or subtracting from the terms of the written contract, unless such oral evidence is admissible under one or more of the provisoes to section 92 of the Evidence Act. The only proviso of section 92 that I can see is applicable to the present case is proviso 2 and that is only applicable when the separate oral agreement is not inconsistent with the terms of the written one.

Owing to the divergence of opinion between my learned colleague and myself and the other questions of difficulty which I consider arise, I am of opinion that the matter is one for the consideration of a Full Bench of this Court and I refer to such the following question :

" On the facts prove and admitted as to the agreement that was entered into by the appellant and the respondent company and which are admissible in evidence, was there an entrustment of property within the meaning of section 405 of the Indian Penal Code to the appellant ?"

The opinion of the Bench was as follows :—

Criminal Reference No. 19 of 1912.

May 20th, 1912.

Fox, C. J.—I understand that the facts admitted and proved are that the company advanced the appellant Rs. 1,000 upon his signing five promissory notes for Rs. 2,000 each payable on demand, and the document set out in the reference : that the company would not have advanced him the money unless he had signed the document as well as the promissory notes : that whether he expended the whole of the Rs. 10,000 on purchasing paddy or not, he supplied paddy to the company of the value of only about Rs. 5,000 at the Rangoon market rate at the time of delivery : that the accused although colloquially called a paddy broker was not a broker in the proper sense of the term, but was a middleman who, if the agreement evidenced by the document had been carried out, would in his own interests have bought at the lowest price he could get paddy at in the village named, and after having it brought and delivered to the company at Rangoon would have received from it credit against the advance of Rs. 10,000 calculated on the ruling market rate in Rangoon on the day of delivery for paddy of the description delivered : that if such price more that covered what he had paid for the paddy and his expenses in bringing it to Rangoon and delivering it, he was entitled to the profit : if however the opposite was the case

(3) 5 L.B.R., 241.

1912.

IN RE PO SEIK. v. KING-EMPEROR.

he was to bear the loss : that until the delivery of paddy to the firm he bore all responsibility for the money he received and for paddy he bought with it, and he was responsible for payment of the promissory notes in any event, even if the money he received was lost by him by misadventure or act of God.

The above liabilities and position of the accused were not, as I understand, the result of any oral agreement ; they are the legal consequences of the documents, and the relationship of the parties. The accused was charged with having dishonestly use part of the Rs. 10,000 advance to him and with having thereby committed criminal breach of trust. This charge involved his having held the Rs. 10,000 on trust for the company. The question is whether he did so held it or not. Criminal branch of trust is defined as follows in section 405 of the Indian Penal Code :—

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly (*i.e.*, with the intention of causing wrongful gain to one person or wrongful loss to another person) misappropriates or converts to his own use that property, or dishonesity use or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'." The name and definition of the offence are the creation of the Indian Legislature. Under ruling of the Privy Council we are precluded from looking for guidance as to the intentions of the farmers to any thing that was said by them before the Penal Code was passed : we are confined to consideration of the words used, but can look for assistance to the illustrations given in the code. Looking at the section and the illustrations it appears to me clear that before a person can be convicted of the offence he must have in some way become entrusted with or with dominion over property of which he is not the beneficial owner, and whilst holding or having dominion over such property, he must have dishonestly done one of the acts enumerated in connection with it. One of those acts is the dishonest use or disposition of the property in violation of any legal contract, but the legal contract must be on the person has made *touching the discharge of the trust.* Mere breach of contract is not made synonymous with criminal breach of trust. In all the cases given in the illustrations to the section in which the person is said to have committed the offence, the property in respect of which he is said to have committed it is property of another person, or property of which the offender was not the beneficial owner, although in one case that of the executor, he had the legal title.

I take it then that the property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or that the beneficial interest in or ownership of it must be in some other per on

and the offender must hold such property on trust for such other person or in some way for his benefit.

The documents in the present case do not appear to me to show that the accused was entrusted with the Rs. 10,000 by the prosecutors, or that he subsequently held it in trust for them or for their benefit. What they do show is that they advanced him the Rs. 10,000 and that he undertook and contracted to use it in a certain way. In colloquial language it may no doubt be said that when one party advances money to another he entrusts him with that money, but the legal position is that the person to whom the money is advanced becomes indebted to the one who has advanced it, and becomes liable to discharge the debt not by paying back the actual coin or currency notes advanced, but by paying other monies or in any other way which may be provided for or agreed upon. I agree with Dr. Gour's view in paragraph 3198 of his Penal Law of India in which he deals with debts and comments on the case of moneys advanced to a contractor for building purposes. He says, "In such a case it would be more correct to say that the money was paid and not entrusted to the contractor, though payment may have been made for a specific purpose and on the strength of a certain assurance."

If the accused held the Rs. 10,000 on trust for the prosecutors or for their benefit, then the prosecutors retained certain rights over the coin or currency notes they advanced, but if on taking the money to his home it had been seized under an attachment in execution of a decree against him, would or could a Court have sustained a claim by the prosecutors to the money as against the attaching creditor? Again, if he held the money on trust for them, the prosecutors might have brought a suit to specifically enforce the contract by compelling him to carry out his undertaking to apply the money only in the purchase of paddy, but would or could a Court under section 12 of the Specific Relief Act enforce such undertaking on the ground that the act to be done was in the performance of a trust?

The case of *Reg.* v. *Townshend* (4) was relied on by the prosecutor's advocate: in that case the accused was held liable to conviction under the 80th section of the Larceny Act, 1861, not in respect of the advance he received from the prosecuting bank, but in respect of the goods and proceeds of goods which the advance enabled him to obtain, and because he had in writing undertaken to hold the goods in trust for the bank and to hand it the proceeds of goods he sold. The document he signed was held to make him a trustee of the goods and proceeds of them under an express trust. There is no such declaration of trust of either the money advanced or the paddy to be bought with it in the agement in this case. The word "entrusted" has been explained and applied in England in *Phillips* v. *Huth* (5) and *Hatfield* v. *Phillips* (6), but these cases were in connection with an act

(4) (1884) 15 Cox's Cr. C., 466. (5) 6 M. and W., 572.
(6) 9 M. and W., 467.

1912.

IN RE PO SEIK v. KING-EMPEROR.

dealing with civil liabilities only, and do not seem to afford much guidance to the interpretation of the word in a penal statute.

The decision of Mr. Agnew in *Maung Pwa Gyi* v. *Queen-Empress* (7) was referred to: in the judgment he said that the fact that the relation of debtor and creditor is established does not necessarily make it impossible to convict the debtor of criminal breach of trust, but he cited no authority for this proposition. The case of the *Queen-Empress* v. *Moss* (8) does not appear to me to support it: in that case the charges against one of the Directors of the Bank as set out in the report were that he had dishonestly misappropriated, etc., the funds of the Bank, not the funds of the depositors, the creditors of the Bank. Being of opinion that the documents in the present case evidence an advance by the prosecutors to the accused resulting in the relationship between them of creditor and debtor, and a contract by the debtor to apply the monies in a certain way, which contract did not establish a relationship of trustee and *cestui qui trust* between them, I would answer the question referred in the negative.

Hartnoll, J.—Though I understood at the first hearing that the terms as to profit and loss agreed on between the parties were the subject of an oral agreement, at the hearing of the reference it was stated that this was not so and it was explained that the terms I referred to as those of an oral agreement were a matter of general practice in Rangoon. Though I have not got it down in my notes, according to the learned Chief Judge, whose judgment I have had the opportunity of reading, he understood that the terms between the parties referred to by me as those of an oral agreement were the legal consequences of the documents and the relationship of the parties. At the hearing of the reference no arguments were based on the case of *J. Reid* v. *So Hlaing* (3) and it was allowed that all admitted facts were admissible in evidence and so it is not necessary to discuss any bearing that that case might have on the decision of this one.

In the order of reference I set out my views and I abide by them. It certainly appears to me that the mere circumstance of taking the five promissory notes does not necessarily establish the fact that the relation between the parties could only have been that of creditor and debtor and that therefore there could have been no entrustment. The real essence of the agreement between the parties seems to me beyond doubt the supply of paddy by appellant with the money of the respondent company and the money was handed over to him for this purpose and no other—a fact which both parties thoroughly understood. It is clear to me that the transaction was no ordinary loan nor was it ever meant to be one by either party. The respondent company reposed confidence in appellant that he would only purchase paddy with the money advanced and but for this confidence

(7) (1893) 2 Bur. L. R., 9. (8) (1893) I.L.R. 16 All., 88.

reposed in him he would not have got it at all. By restricting its use I am unable to hold that the respondent company ever parted with all their property in the money. But as I have noted in the order of reference the difficult point of the case to my mind is whether the conditions of profit and loss are so incompatible with a state of entrustment that it should be ruled that there was no such state. After the most serious consideration I have come to the opinion that they are not. It is not impossible to hold a thing in trust and yet be responsible in case of its loss. To take a simple case—A hires a carriage to B for a certain monthly sum, one of the terms of the contract being that B is responsible for all damage to, or the total loss of, the carriage. In such a case if B dishonestly sold the carriage and used the proceeds, he would clearly be guilty of criminal breach of trust and yet he agreed to bear all loss that happened to the carriage. The present case is a more complicated one ; but yet I think that the same principle comes in. Though appellant held the money in trust, yet, if he chose to do so, he could contract to render himself liable for all loss incurred with respect to it.

Holding therefore the views I do I would answer the question in the affirmative.

Ormond, J.—The answer to the question referred, depends I think upon the answer to the following question :—

Do the two documents and the admitted facts show—either (i) that it was the intention of the parties that the complainant should retain the ownership of the money handed over to the accused ; and should be the owner of the paddy, as soon as the money might be converted into paddy ? or

(ii) that the accused having borrowed the money from the complainant, constituted himself a trustee of that money for the complainant ?

The promissory note would show that the money was advanced as a loan ; and consequently that the accused became the owner of the money. And there is nothing in the other document to show that this was not so. There is nothing in writing to show that the promissory note was only to take effect in certain events. The second document speaks of the money as having been " advanced " to the accused and the accused undertakes to " use " it in a specified manner. *i.e.*, to buy paddy with it ; the accused is to " deliver " the paddy to the complainant and is to be credited with its market value on the day of delivery. This is quite consistent with the accused having to buy the paddy on his own account and agreeing to sell it to the complainant. And the admitted facts, *viz.*, that the accused was a paddy dealer and that he was to bear any loss and to make any profit he could out of the transaction, places it beyond question, to my mind, that the accused was to buy the paddy on his own account and not as trustee or agent on behalf of the complainant. If the document had not recited the fact of the advance by the complainant, it would be simply a contract under which the complainant agreed

1912.

IN RE PO SEIK v. KING-EMPEROR.

to buy and the accused agreed to sell, about 10,000 baskets of paddy at the market rate of the day on which delivery is given, delivery to be given within twenty days.

And the second document clearly does not contain a declaration of trust on the part of the accused. It contains an expression of intention on the part of the accused to expend a certain fund (which belonged to him) in the purchasing of paddy ; and an undertaking to sell that paddy to the complainant. But there is a great difference between a promise to expend money in a certain manner "in futuro," *e.g.*, in the purchasing of paddy,—and a declaration of trust "in præsenti" in respect of the contemplated fund. And it can make no difference how the accused became the owner of the fund—whether by loan from the complainant or otherwise. If the facts had simply been that the accused had said to the complainant : "I have Rs. 10,000 in my pocket—If you promise to buy and take delivery of 10,000 baskets at any time within 20 days at the market rate of the day on which delivery is given, I will promise to buy paddy and sell it to you"—and if that proposal was accepted, it could not be contended that the accused had constituted himself a trustee for the complainant in respect of that Rs. 10,000.

In a prosecution for criminal breach of trust the fact of the trust must be established beyond all resonable doubt ; but in this case prosecution in effect ask the Court to find that a trust is necessarily implied because the accused promised to buy paddy with the money, at his own risk and on his own account ; and to sell the paddy to the complainant. The loan by the complainant was no doubt induced by the promise of the accused ; but I can find no sufficient indications of the trust in the two documents and the admitted facts. I would therefore answer the question referred in the negative.

Robinson, J.—It is necessary to state distinctly what are the facts proved and admitted in this case. I am of opinion that they are as follows :—

Accused is a paddy dealer. He entered into an agreement with complainant on 21st March 1911, the object of which was that he should supply, and complainant should receive, about 10,000 baskets of paddy which were to be bought at Mingaladon and delivered within 20 days of that date at complainant's Dawbon mill. Complainant the same day advanced him Rs. 10,000 to enable him to obtain this paddy and the parties agreed that the account should be settled by complainant taking over the paddy at the ruling market rate on the day of delivery. The accused undertook to use this sum for no other purpose than the purchase of the abovementioned 10,000 baskets of paddy.

The accused executed simultaneously five promissory notes for Rs. 2,000 each in favour of complainant.

The price at which complainant agreed to take over the paddy was fixed and accused was to bear the loss, if any, and

1912.

IN RE PO SEIK v. KING-EMPEROR.

was to retain the profit, if any, resulting from the price at which he bought the paddy.

The question then is whether there was an entrustment of this money to accused by the complainant ? Did the legal ownership of the money remain in the complainant or was there merely a debt due by accused to the firm ?

There can be no question that the money was advanced under the agreement that it should be used for the one specific purpose of buying paddy to be delivered to the complainant and for nothing else. The accused no doubt promised that this should be done and would not have got the advance unless he had so promised. But is that sufficient to create an entrustment ? We must I think regard all the circumstances and there are the facts as to the profit and loss and the fact of the execution of the promissory notes.

The accused was clearly not the agent merely of the complainant, but a buyer of them and no more. If he had been the complainant must have taken the profit or borne the loss. The complainant wanted the paddy and was willing to assist accused towards getting it for them. Accused was willing to get it, but would only do so if the complainant helped him with an advance. The consideration to the accused was the chance of making a profit and the fact that he would have to bear the loss shows that the legal ownership in the advance vested in him. The profit or loss to the complainant arose from the price ruling on the day of delivery and had nothing to do with the price on date of first purchase. It might be argued that the chance of profit was the payment for the service to be rendered, but there is more present here in the liability to bear the loss takes the matter out of the category of mere remuneration and has a distinct bearing on the question of ownership of the advance.

Then we have the execution of the promissory notes. These cannot be regarded merely as an extra precaution or as providing a ready means of recovering the money on breach of the contract to supply paddy. They evidenced *primâ facie* a loan and they must be given the ordinary legal effect that they carry. This must be taken into consideration with the facts and inferences set out above and they greatly strengthen the argument that accused was not a mere agent but was legal owner of the money.

For the purposes of the criminal offence it is essential that there should have been an instrument that a trust should have been created. This is not to be lightly assumed but must be clearly proved. The mere fact that promissory notes were taken does not prove a loan, but even if none had been executed I do not see that accused can be held to have become a trustee. Complainant wished certain things to be done for his benifit and was prepared to help accused to do them. This is a common experience. The money is given not as a loan merely nor as a trust. It is advanced to enable accused to do that which will be for complainant's benefit and accused is prepared

1912.

IN RE PO SEIK v. KING-EMPEROR.

to undertake the work on the chance of making a profit. It is a loan with a condition attached, which condition was not fulfilled. I am unable to find that the money advanced remained the property of the complainant or that it was entrusted to accused in such a way as to amount to an entrustment and so to bring failure to carry out the promise within the purview of the criminal law.

Suppose accused had gone to Mingaladon and arranged for the purchase of 10,000 baskets but had then been robbed of the Rs. 10,000. Would he have had to bear the loss? Complainant. I take it would say so and sue on the promissory notes and they would deny all liability to the vendors of the paddy to carry out the contract. It could not legally be held that accused was their agent so as to connect them with the contract to purchase. Moreover, it is stated in the order of reference that under these circumstances accused was to bear the loss.

I think the question referred should be answered in the negative.

Parlett, J.—I am inclined to think that it was the intention of both parties to the transaction that the complainant firm should retain some dominion over the money in the hands of the accused, but that they have not succeeded in carrying out their intention. In my opinion the effect of the documents and of the agreement between the parties as to profit and loss on the transaction and as to liability for loss of the money advanced from whatever cause arising was that the property in the money passed to the accused. I doubt whether the last clause of Exhibit A amounted to a declaration of trust with respect to the money in the paddy into which it might be converted, and unless it did the beneficial interest remained with the accused. I would answer the question referred in the negative.

Before Mr. Justice Twomey, Esq

LIEUT.-COLONEL STEWART *v.* SIMOM GONSALVES.

Civil Revision No. 171 of 1910.

February 29th, 1912.

S. S. Halker—for applicant (defendants).

F.R. Bomanji—for respondents (plaintiff).

Master and servant—wages due—departure without notice—wrongful dismissal.

A servant engaged by the month who leaves without notice is entitled to be paid down to the date when wage were last due but not for the broken period during which he has served since that date.

Raja Shew Bakhsh Bogla v. *Perumall*, (1904-05) 2 U.B.R., Master and Servant. 1 ; *Dhumee Behara* v. *Sevenoaks*, 13 Cal. 18 ; *Ramji Manor* v. *F. D. Little*, 10 Bom. H.C.R., 57 ; followed.

Twomey, J.—The plaintiff-respondent was the defendant-petitioner's cook at Rs. 27 a month, and the case set up in the plaint was that the plaintiff-respondent was "compelled to leave owing to the conduct of the defendant's wife." He left on the 29th July, admits receiving his wages up to the end of June, and sues for the amount due for the broken period, 1st to 29th July.

1912.

LIEUT-COLONEL STEWART *v.* SIMON GONSALVES.

The Township Court granted a decree on the ground that the plaintiff was turned out by the defendant's wife. The learned Judge overlooked the fact that the plaintiff did not allege wrongful dismissal at all in the plaint. From the evidence of his own witnesses it appears that he left because Mrs. Stewart was dissatisfied with his cookery and threw away the breakfast ordering him to cook another. It need hardly be said that Mrs. Stewart had every right to give such an order, and it was the respondent's duty to obey it. He seems to have left merely because his professional *amour propre* was wounded. Only one witness—his "matey" supports his statement that he was dismissed. This witness left at the same time as the cook and is probably entirely biassed in the plaintiff-respondent's favour. It is clear that the lower Court erred in making out a case of wrongful dismissal which was not set up in the plaint and which is not supported by the plaintiff's own witnesses.

The law applicable to the subject was fully considered in the Upper Burma case *Raja Shew Bakhsh Bogta* v. *Pirumall* (1). It was held that a monthly servant who leaves without notice is entitled to be paid down to the date when wages were last due, but not for the broken period he has served since that date. This is the English law as explained in Smith on Master and Servant (page 182) and it has been adopted in India (see *Dhumee Behara* v. *C. Sevenoaks* (2) and *Ramji Manor* v. *F. D. Little* (3).

The respondent was admittedly paid his wages up to the date when wages were last due. He has no claim to wages for the period during which he served in July as he left abruptly without notice and without any fault on the part of his employer before that month was finished.

The decree of the lower Court is therefore set aside and the plaint is dismissed with costs in both Courts.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

Civil 2nd Appeal No. 176 of 1910.

March 18th, 1912.

T. A. SITHAMBERAM CHETTY CARRYING ON BUSINESS OF A BANKER AND MONEY-LENDER UNDER THE FIRM MARK OF T. A. BY HIS DULY CONSTITUTED ATTORNEY ARUNACHELLAM CHETTY ... *Appellant* (plaintiff).

v.

1. KHA GYI,
2. HNIN GON,
3. PO SIN,
4. THA MYAT,

Respondents (defendents).

F. S. Doctor—for appellant (plaintiff).

Ba Dun—for respondents (defendants).

Limitation—mortgaged property destroyed by negligence of a third party —period of limitation within which a suit may be filed—in construing

(1) 2 U.B.R. (1904-06), Master and Servant, 1.
(2) I.L.R., 13 Cal., 80. (3) 10 Bom. H.C.R., 57.

1912.

T. A. SITHAMBERAM CHETTY v. U KHA GYI.

description of suits in First Schedule of the Limitation Act, natural meaning to be followed—Articles 36 and 49 of First Schedule, Limitation Act, 1908.

A lent money to B accepting as security a mortgage on a country boat amongst other properties. This boat was alleged to be sunk by the negligence of C.

A filed a mortgage suit against B, in which he was successful.

On the question as to whether a suit against C was barred by limitation under Article 36 of the First Schedule of the Limitation Act, 1908, or whether Article 49 applied, it was held that the latter specially provided for a case such as that cited. The boat pledged was specific moveable property. Article 49 should be given its natural meaning and not construed with reference to the cases to which Article 36 was meant to apply.

Essoo Bhayaji v. *The steam-ship "Savitri,"* I.L.R. 11 Bom., 133, dissented from. *Surat Lall Mondal* v. *Umar Haji*, I.L.R. 22, Cal., 877; *Mangun Jha* v. *Dolhin Golab Koer*. I.L.R. 25 Cal., 692; followed.

Hartnoll, J.—The appellant brought a suit against one Ko On Ywe and the respondents alleging that Ko On Ywe had borrowed from him Rs. 2,500 on interest and as security for the loan had mortgaged to him a house and compound with trees thereon and also a country boat. He made the interest due Rs. 2,850 but relinquished Rs. 1,950 of it. He therefore asked for a mortgage decree against Ko On Ywe for Rs. 3,400. He further alleged that the servants of the respondents had caused their barge to collide with Ko On Ywe's boat which was pledged with him and by negligence had sunk it, so that it became a total loss. He therefore sued the respondents to recover from them Rs. 3,000 out of the Rs. 3,400 he desired from Ko On Ywe—Rs. 3,000 being the value of the boat. A mortgage decree for Rs. 3,400 was passed against Ko On Ywe; but the claim against the respondents was dismissed by the District Court on the ground that it was barred by limitation. This decision was upheld on appeal by the Divisional Court. This further appeal has now been laid and the sole point for determination is whether Article 36 or Article 49 of the First Schedule of the Limitation Act is applicable to the case. If Article 36 is applicable the claim is barred by limitation; if Article 49 is applicable it is not. On behalf of the respondents the case of *Essoo Bhayaji* v. *The Steam-ship 'Savitri'* (1) is relied on; but amongst others the appellant relies on the cases of *Surat Lall Mondal* v. *Umar Haji* (2) and *Mangun Jha* v. *Dolhin Golab Koer* (3). I am unable to agree with the decision of Farren, J., in the Bombay case and I agree with the reasoning of the majority of the Calcutta Judges. Article 36 only relates to such cases as are not specially provided for in the schedule. Article 49 seems to me to especially provide for a case such as the present. It runs "For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same." The boat pledged was specific moveable property using the word 'specific' in its ordinary sense and meaning. I am unable

(1) I.L.R. 11 Bom., 133. (2) I.L.R. 22 Cal., 877.
(3) I.L.R. 25 Cal., 692.

1912.

T. A. SITHAMBERAM CHETTY v. U KHA GYI.

to import into the Article the meaning which Farren, J., does, namely, that the specific moveable property which is injured must be in the possession of some third party for it to apply. In construing the meaning of Article 49, I do not think that we should consider to what cases Article 36 is meant to apply. Article 49, in my opinion, should be given its natural meaning. It provides for compensation for injury to specific moveable property other than that referred to in Article 48 and therefore in my opinion to a case like the present.

I would under Order 41, Rule 23, set aside the decrees of the lower Courts as regards the respondents and remand the case to the District Court to be decided on its merits; costs to follow the final result. I would also under the provisions of section 13 of the Court Fees Act grant appellant a certificate authorizing him to receive back from the Collector the full amounts of the fees paid by him on the memorandum of appeal in the Divisional Court and this Court.

Fox, C.J.—I concur.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

Civil 1st Appeal No. 79 of 1910.

March 27th, 1912.

MA SU *v.*

1. MA TIN.
2. E KIN, A MINOR BY HER NEXT FRIEND HNIN U.
3. BA GYI, A MINOR BY HIS NEXT FRIEND PO SIN.
4. BA THAN, A MINOR BY HIS NEXT FRIEND BA THET.
5. PO TA.
6. MA TIN.
7. BA LWIN
8. MYA THIN
9. BA MAUNG — MINORS BY THEIR FRIEND MA TIN
10. KHIN MAUNG

— LEGAL REPRESENTATIVES OF PO KA, DECEASED.

R. S. Dantra—for appellant.

Godfrey—for 1st to 5th respondents.

Alexander—for 6th to 10th respondents.

Inheritance—deed of partition—preferential treatment in favour of one of the children—attention to parents during their lifetime—'Auratlip' son—rights of his offspring—Dhammathats—Kinwun Mingyi's digest, sections 162, 163, 164.

A before his death while in an unfit state of mind to dispose of his properties signed certain deeds of gift whereby the property acquired during

1912.

MA SU
v.
MA TIN.

the lifetime of himself and his wife was partitioned in favour of his three surviving children B, C and D against whom the other descendants of A institute a suit. Judgment was given in favour of a distribution based on the principles of Buddhist Law.

On appeal this judgment was upheld.

It was held that B who had under the original deed of partition received preferential treatment was not so entitled on the ground that she had attended to her parents more than the others.

It was further held that the children of an 'Auratha' son should be not individually but collectively placed on the same footing as their surviving uncles and aunts.

Tun Myaing v. *Ba Tun*, 2 L.B.R., 292, followed.

Ma Kyi Kyi v. *Ma Thein*, 3 L.B.R., 8; *Seik Kaung* v. *Po Nyein*, 1 L.B.R., 23; *Po Sein* v. *Po Min*, 3 L.B.R., 45; referred to.

Robinson, J.—U Po Lu and Ma Po had at least 7 children, Maung Nyo, Ma Kyan, Ma Su defendent 1, Ma Kyaw, Maung Po Ta, defendent 2, Maung Po Kha, defendant 3 and Ma Thein. Defendant 1 says they also had two others who died quite young. Maung Pe their first born and Maung Sein the last born. Plaintiffs are the children of those who predeceased their parents, plaintiffs 1 and 2 being the daughters of Maung Nyo, plaintiff 3 the son of Ma Kyan and plaintiff 4 the son of Ma Thein. Ma Su defendent 1 lived with her parents. On the 23rd November 1906 U Po Lu partitioned the jointly acquired property of himself and his wife by executing deeds of gift in favour of his three surviving children. The largest share was given to Ma Su, while his two sons got one house each. The children of his deceased children got nothing and they now bring this suit for a declaration that the deeds of gift were null and void and asking that the estate be administered through the Court. The grounds on which the deeds are attached are that Po Lu was not in a fit state of mind to execute them; that their execution was procured by undue influence and pressure; that they amounted to death-bed gifts and that they were never completed by possession. It is further urged that Ma Po never consented to the gifts.

As to this last matter I think there can be no doubt that Ma Po knew of the intended gifts and approval of them. It is said by Ma Su that the idea of partitioning the property originated with Ma Po when she got seriously ill and thought she might die. She was present when the deeds were executed and registered and I decide this issue against the plaintiffs.

There is no evidence that U Po Lu was angry with his sons or had any ground for treating them in the way he did. They assisted their father in his business and looked after his property, though they lived separately. Maung Po Ta says he knew nothing about the deeds of gift until they had been executed and registered and I think this is undoubtedly the case. When he did learn about them it is not denied that he went to his mother and protested strongly against the unfair division. Ma Su said it was the father's division. The deeds of gifts had been executed on the 23rd November 1906. Maung Ta before he

knew of them had called in Dr. Pedley to see his father who had been partially paralized for the last 9 or 10 years. What he learnt from Dr. Pedley is not deposed to with any certainty, but he went to Ma Su and demanded a more equal division and so did Maung Pe Kha. The result was that Ma Su gave them another house each. She says she consulted her father, who said the property was then hers and she could do as she liked, but that her brothers would give her trouble and that they had brought in Dr. Pedley to give her trouble. Whether U Po Lu really said this or not the statement is most significant in view of what Dr. Pedley's evident is. With this extra house the brothers seem to have been contented, but when Ma Tin, the eldest grandchild, came of age, she was not satisfied to leave matters at rest.

U Po Lu died on the 3rd March 1907 at the age of 75 and Ma Po on the 26th May 1907, aged 70. U Po Lu had been more or less ill for many years and the sayas called in could not do him any good. Dr. Pedley saw him on the 27th and 29th November 1906 that is 4 or 6 days after the execution of the deeds. He deposes that he was then weak and his dotage, that is stupid and almost suffering from dementia. He says he could not have held him responsible for his actions or capable of making any disposition of his property. He says he questioned him about his health but his answers wandered off to other matters and were stupid ; that he was not capable of sustained thought and that there was some mental deficiency. He says further that it was not a sudden attack but that the weakness of brain had been growing for some time previously.

Against this evidence it is urged that Dr. Pedley sees hundreds of people every week and may be mixing up U Po Lu with some one else—that this is borne out by the evidence for defendant 1. Dr Pedley, however, while admitting that his memory of the case is indistinct on some matters says his recollection of his first visit is quite clear. That he did visit U Po Lu is not denied and his statements are too positive to have been made unless he was certain. He must have been aware of the serious consequences that might ensue on his evidence and whether he was mistaken or not it is certain he had no doubt that U Po Lu was the very man as to whose condition he was deposing.

The evidence for defendant 1 relied on to show Dr. Pedley was mistaking one case with another is first that of Maung Po Chit. He is a friend of the family who says he constnly visited U Po Lu and he never noticed any weakness of intellect. He says Ma Su told him her farther wished his help as he was going to partition his property. She told him what the division was to be. He saw U Po Lu and he told him his wishes and asked him to get a lawyer to carry them out. The instructions were given orally and he received some tax receipts. He went to Mr. S. Dhar and instructed him to draw up the

1912.

MA SU
v.
MA TIN.

necessary deeds. He went back to Mr. Dhar the next day, got the deeds and took them and explained them to U Po Lu who approved and said they must be registered. He returned the deeds to Mr. Dhar and went to him again later that same day when he received the deeds engrossed and stamped. They were then again taken to U Po Lu. Mr. Dhar also went and explained them and they were then executed. U Po Lu's hand had to be held as he was so shaky. They were then taken away by Mr. Dhar who arranged to get them registered. He says there was no desire to get the deeds prepared speedily.

Mr. Dhar naturally says he saw no signs of unfitness in U Po Lu to execute the deeds. He says Ma Su accompanied Po Chit to give him instructions. He prepared them and had them engrossed and stamped and took them to U Po Lu. This was the day after he had received instructions and because he has been asked to have them ready by the next day. He was paid a little more than the ordinary fee as he had to go to U Po Lu's house to get than executed. Ma Su says a special fee was paid to get the deeds ready the same day. Both she and Po Chit omitted to mention that she also went to Mr. Dhar until pressed in cross-exmination and both made out that there was no hurry over the matter. She makes out that Dhar took instructions from U Po Lu and went to him twice, but Mr. Dhar only remembers one visit and that when the deeds were to be executed. Mr. Dhar says he did not know U Po Lu before and his recollection is only what he can recall by refreshing his memory from the deed he drew.

Then Mr. Wall went to the house and registered the deeds. He did not know U Po Lu before though Ma Su says he did because he enquired after U Po Lu's health when he came in. His clerk knew U Po Lu and the house and took him there. He says he had some slight talk with U Po Lu while Maung Kha and some lugyis were being called. When they came he formally examined U Po Lu as to the execution and then registered the deeds. U Po Lu gave him the impression of being in rather indifferent health. He thinks he had to be helped to a sitting position to sign and had to be supported while he remained sitting up. He does not remember his hand having to be held while he signed though this was admittedly the case. He was not told any details and was not aware there was any question as to his mental capacity. In short all Mr. Wall remembers is that he was a very old man in indifferent health. He was there about half-an-hour and says that if he had had any suspicion as to his mental capacity he would not have registered the deeds.

There only remains the evidence of Po Kin, a neighbour, who says he was a constant visitor and that there was never any question of U Po Lu's mental capacity.

It is I think clear that no great reliance is to be placed on either Po Chit or Po Kin's evidence and Ma Su's evidence is

interested and if anything weaken her case. She had always lived with her parents and was the lugyi of the household. The deeds she admits were executed because her mother got very ill and thought she might die and her father was also a very old man. She admits also that they feared her brothers might give her trouble. She tries to make out that they were not altogether dutiful but there is nothing to support this. Her attempts to conceal the part she took in instructing Mr. Dhar tell against her and her afforts to show the deeds were not hurried through and then her admissions as to a special fee also weaken her case. She admits it was the state of her mother's health that led to the deeds being quickly put through and tries to make out Mr. Dhar enquired if the grandchildren were not to get anything which is almost certainly untrue.

Such evidence as Mr. Dhar and Mr. Wall give cannot possibly override Dr. Pedley's evidence. I am satisfied that Dr. Pedley was not mistaking one case with another and am forced to the conclusion that U Po Lu was not in a fit state of mind to make a disposition of his property. The gifts were also made when he was in a very weak state of health when both he and his wife were contemplating early death and they died without recovering and not long after.

But even if the gifts were otherwise good there is no evidence but Ma Su's that possession ever followed them, except in the case of the jewellery. There must be some evidence to show that in addition to making the gift U Po Lu divested himself of his ownership. Even before the gifts Ma Su and her brothers had been collecting the rent so that if she collected them after this does not establish possession and on this ground also I hold that the gifts are not good and valid. I accordingly declare them null and void and cancel them.

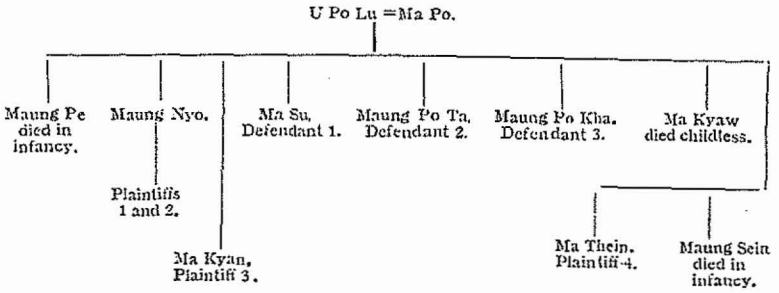
There remains the question as to what are the shares of the parties in the estate of U Po Lu and Ma Po ? The two children who died very young may be left out of consideration. Ma Kyaw also predeceased her parents and left no heirs. There are thus six children to be considered. It is admitted that Ma Su, Maung Po Ta and Maung Po Kha will get equal shares and that plaintiffs 2 and 3 are each entitled to one-fourth of the share that their parent would have got, that is one-fourth of one-sixth. As to plaintiffs 1 and 2 it is urged that there is no proof except Ma Su's word that Maung Pe ever existed but that if he did he died so young that he never attained the position of *auratha* child. That position was succeeded to and attained by Maung Nyo and that therefore plaintiffs 1 and 2 are entitled to the same share as Ma Su and her brothers. The position of *auratha* child having once been filled does not descend to the next child and so no one else can claim it.

There is ample judicial decision on the questions arising in this case and I need not repeat all the grounds on which

1912.

MA SU
v.
MA TIN.

those decisions were arrived at. The following is the pedigree table :—



The first question is whether Maung Nyo was the *auratha* son. Maung Pe, if it be accepted that he ever existed, died in infancy. As the first born he was entitled as of right to be the *auratha* provided he attained majority and was otherwise fit to take his father's place as head of the family. He did not satisfy these conditions and thus never technically became the *auratha*. On his death Maung Nyo succeeded to the right to become the *auratha* and attained his majority. It is not suggested that he was not competent to fill the position of *auratha* and I hold that he attained that status. The status having been obtained no other child could claim or attain that status and his children aree ntitled to whatever rights their father's status gives.

This is laid down in *Tun Myaing* v. *Ba Tun* (1), *Ma Saw Ngwe* v. *Ma Thein Yin* (2) and see also *Ma Mya* v. *Maung Po Thin* (3), that Maung Nyo was technically the *auratha* and as to the rights that flow therefrom I follow the decision in *Po Sein* v. *Po Min* (4).

The result is that I hold that plaintiffs 3 and 4 are each entitled to one-fovrth of the one-sixth share that their parents would have received. This leaves forty-four-forty-eighths to be divided equally between plaintiffs 1 and 2, Ma Su, Maung Po Ta and Maung Po Kha. Plaintiffs 1 and 2 will therefore get eleven-forty-eighths between them and Ma Su, Maung Po Ta and Maung Po Kha will each get eleven-forty-eighths.

Plaintiffs 1 and 2	...	...	...	... $\frac{11}{48}$
Plaintiff 3	...	...	...	... $\frac{2}{48}$
Plaintiff 4	...	...	...	... $\frac{2}{48}$
Ma Su ...	...	...	...	... $\frac{11}{48}$
Maung Po Ta	...	...	...	... $\frac{11}{48}$
Maung Po Kha	...	...	...	... $\frac{11}{48}$

The jewellery was given at the same time and under the same circumstances as the deeds of gift and I set aside that gift also.

(1) 2 L.B.R., 292.
(2) 1 L.B.R., 198.
(3) P.J.L.B. (1893-00), 585.
(4) 3 L.B.R., 45.

There will be the usual preliminary decree for an account of the estate. The parties to nominate a Commissioner within a week. Defendant 1 will pay the costs up to date of plaintiff 1 as taxed. The other parties to bear their own costs.

Hartnoll, J.—One of the most important issues in the determination of this appeal is whether Maung Po Lu was in a fit state of mind to give away his property when he signed the disputed deeds on the 23rd November 1906. He was admittedly then an old man of 74 and had been paralyzed for years. Ma Su was living with him at the time. By the deeds of gift Ma Su obtained the lion's share of the property, her brothers Po Ta and Po Kha obtaining one house each. Po Lu ignored his grandchildren altogether in the distribution of his property. No reason is advanced as to why he should have ignored Ma E Kin, Maung Ba Gyi and Maung Ba Than, and the reason advanced as to why he should have been displeased with Ma Tin is not proved. Within a few days of the gifts Ma Su yields to pressure from her brothers and gives them another house each. The above facts make me look on the deeds with suspicion; but when the evidence and pleadings are further examined it seems to me to be shown beyond all reasonable doubt that Po Lu was not in a fit state of mind to make any disposition of his property on the 23rd November 1906. In their written statement Po Ta and Po Kha allow that such was the case. Just after the deeds were executed Po Ta calls in Dr. Pedley. It seems very probable that this was to have evidence ready if necessary as to his father's state of mind at the time though he did not then make any fuss as his parents were still living and he had been quieted by the gift of another house. Dhar, the lawyer, did not get his instructions and fee from Po Lu. Ma Su paid his fee and from a consideration of the evidence it is clear that the instructions also came from her either directly or through Po Chit. Ma Su was the leading spirit in getting the deeds prepared. Mr. Wall, the Registering Officer, has no very distinct recollections of what occurred; but he thinks that Po Lu required propping up in which position he could not remain without assistance. He says that he took no more notice of Po Lu than he did of other people who come to register deeds. Then we have Dr. Pedley's evidence that Po Lu was not in a fit state of mind when he saw him just after the deeds were executed. He has a distinct recollection of his first visit, and the surrounding circumstances and probabilities are strongly corroborative of his evidence. It is admitted that Po Lu could not even sign the deeds without assistance. I therefore agree with the conclusion arrived at by the learned judge on the original side that Po Lu was not in a fit state of mind to make any distribution of his property on the 23rd November 1906, and that therefore the deeds should be declared invalid and of no effect. It was not urged at the hearing of the appeal that, if the deeds were declared invalid, the gift of the

1912.

MA SU
v.
MA TIN.

jewellery should be treated in any other manner and as the same circumstances apply to them as to the deeds of gift they should also be set aside.

A further objection was raised which was as to the share of the inheritance allotted to Ma Tin and Ma E Kin. They were the daughters of a son Maung Aung Nyo who predeceased his parents. Ma Su urges that he was not the *auratha* son but that one Maung Pe was. She has not proved the existence of Maung Pe nor even that if he ever did exist he succeeded to the rights of an *auratha* son. The subject was considered in the case of *Tun Myaing* v. *Ba Tun* (1) and I see no reason to differ from the conclusions arrived at in that case. I am therefore of opinion that for the purposes of a division Maung Aung Nyo must be held to have been the *auratha* son. It was then urged by Ma Su's counsel that, since Ma Su attended her parents as she did up to the time of their deaths she is entitled to more than the others and that in any case the principal laid down in the case of *Ma Kyi Kyi* v. *Ma Thein* (5) should be followed. Maung Aung Nyo's children not being treated more favourably than the children of Ma Kyan and Maung Thein. No good authority has been quoted for treating Ma Su more favourably than the others, and the argument, that she should get preferential treatment on the ground that she attended to her parents more than the others, has never been assented to as general proposition by the Courts. She seems to have been correctly treated when she is given the same share as her brothers. Counsel for Ma Tin and Ma E Kin claim that they should get more than they have been allotted—that Maung Aung Nyo's eldest child should rank with Ma Su, Po Ta and Po Kha and his youngest child with Ba Kyi and Ba Than. If such an argument were allowed to prevail, this would give Maung Aung Nyo's children more than he would have obtained himself and such a result would obviously be unjust. The rules applicable are quoted in sections 162, 163 and 164 of the Kinwun Mingyi's Digest. Though many of the texts in section 162 say that the eldest son of an *auratha* son who is deceased shall receive the same as the youngest of his uncles, yet the reasonable and obvious meaning to put on the texts is that the children of the eldest son shall receive the same as the younger brother and this is the rule laid down by the Vinicchaya and Pakasani Dhammathats. Lastly I see no reason to extending the principal of equalization to a case of this kind. The *auratha* son is given more favourable treatment by the Dhammathats than other sons. This practice is followed by the Courts under particular circumstances. I would instance the case of *Seik Kaung* v. *Po Nyein* (6). There is great unanimity in the texts collected at sections 162, 163 and

(5) 3 L.B.R., 8. (6) 1 L.B.R., 23.

164 of the Digest as pointed out in the case of *Po Sein* v. *Po Min* (4). I therefore consider that the share allotted to Maung Aung Nyo's children was correct.

I would dismiss the appeal with costs.

Fox, C.J.—I concur.

1912.

MA SU
v.
MA TIN.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

Civil Miscellaneous Appeal No. 116 of 1911.

May 9th, 1912.

1. HAJEE AHMED MOOLA DAWOOD.
2. HAJEE MAHOMED VALEE MAHOMED HOOSAIN.
3. HAJEE TAR MAHOMED HOOSAIN.

1. POKERMULL.
2. RAM BUX.
3. SONVIAM RAMESHWAR BY HIS AGENT AND ATTORNEY RAM NARAIN DAS.

Alexander—for appellants (plaintiffs).

Giles—for respondents (defendants).

Light and air—ancient lights—actionable obstruction—substantial prevention of light essential—execution of a decree—limitation—Rule 32, Order XXI, Code of Civil Procedure—Article 182, First Schedule, Limitation Act, 1908.

A obtained a decree in 1899 restraining B from erecting a building in such a way as to obstruct or diminish the access of light and air to A's windows. A's sons in 1911 asked for enforcement of this decree against the trustess of the property which had been B's on the ground that a building was being erected in contravention of the terms of the decree.

On the question as to whether an application to the Court to exercise its powers under Rule 32 of Order XXI is an application for the execution of a decree it was held that the application was of this nature and as such was barred under Article 182 of the First Schedule to the Limitation Act, 1908.

Apart from this finding it was held that no actionable obstruction of ancient lights was constituted by the erection of the building inasmuch as there was no substantial prevention of light sufficient to render the occupation of the house uncomfortable according to the ordinary notions of mankind.

Ram Saran v. *Chatar Singh*, (1901) I.L.R. 23 All., 465, referred to, *Colls* v. *The Home and Colonial Stores*, (1904) Law Reports, A.C., 179, followed.

Fox, C.J.—On the 6th November 1899 the appellants father obtained a decree against the respondents in the Court of

1912.

HAJEE AHMED MOOLLA DAWOOD v. POKER-MULL.

the Recorder of Rangoon the material portion of which was in the following terms :—

"It is ordered and decreed that the defendants, their contractors, agents and workmen be and are hereby restrained from continuing the erection of the building in such a way as to obstruct or diminish the access of light and air to the said windows or any of them, or to interfere with or destroy the said projecting eaves, and that the defendants do pull down so much of the said house as may be erected hereafter and as shall interfere with such access of light and air or eaves."

On the 16th February 1911 the appellants petitioned this Court stating that on the 10th January 1911 the first respondent had started re-erecting the said building in contravention of the decree, in particular in building above the previous building as it existed before the suit, and as it stood after the defendants had removed the part in respect of which the injunction was obtained.

The appellants asked that notice might issue to the first respondent to show cause why he should not be arrested for contempt of Court, and asked for orders for the enforcement of the decree by his detention in the civil prison, and for the attachment of his property under the provisions of Order XXI, Rule 32 of the Civil Procedure Code, 1908, and for an order authorizing the appellants to enter the respondent's adjoining house and to remove all the building and building material erected since the 2nd January 1911 at the cost of the respondent and that the proceeds of the attached property might be held liable for such costs of removal when ascertained, as if they were costs in the decree in respect of which the said property was asked to be attached.

The first sole respondent was a trustee only of the property adjoining the appellants' property; notice was accordingly directed to be issued to the other trustees as well as to the first respondent.

At the hearing objection was first of all taken on their behalf that the application being an application for execution of a decree was barred by Article 182 of the Indian Limitation Act, 1908, corresponding with Article 179 of the Indian Limitation Act, 1877.

In consequence of there being three decisions of High Courts to the effect that application under section 260 of the previous Code of Civil Procedure were not regulated by Article 179 of the Limitation Act, 1877, the learned Judge did not sustain the objection, although as he says, in none of the cases is the reason for the conclusion vouchsafed or clear. The learned Judge

himself drew a distinciton between *executing* and *enforcing* decrees, which seems to be a distinction without a difference.

The first question we have to decide is whether an application to the Court to exercise its power under Order XXI, Rule 32, is an application for the execution of a decree. Order XXI deals with the execution of decrees and orders: Rules 30 to 36 inclusive deal with the modes of execution: under the circumstances I fail to see how an application to a Court to exercise one of the modes laid down can be other than an application for execution of a decree or order. If it is such, then it falls under Article 182 of the Limitation Act. In the case of *Ram Saran* v. *Chatar Singh* (1) it was said that a Court might enforce its decree in such a case as the present by process for contempt of Court, but I am not aware that Courts in India other than Chartered High Courts have such power. I would hold that the application in the present case was barred by limitation, but even if this were not so, there is no ground for interfering with the order of the learned Judge. The decree by itself is not intelligible: to understand it reference has to be made to the pleadings in the suit to ascertain what buildings and what windows were referred to, and in respect of what acts on the part of the defendants the plaintiff complained, and what remedy he sought.

It appears from the record of the case that the defendant then proposed to put up a building on their land which would have had a wall quite close to the northern wall of the plaintiff's building, and this must have shut out practically all access of light and air to the two small windows in the plaintiff's northern wall. The plaintiff proved that he had by prescription gained a right to light and air to those windows, and in consequence he obtained the decree. The respondents have now put up a building which still leaves access of light and air to the windows, although there may be not so much coming to them as came when there was no building there. In *Colls* v. *The Home and Colonial Stores* (2) the House of Lords decided that the law was, and always had been, that to constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind.

The respondents have left a space of between 11 and 12 feet free opposite the windows in the north wall of the appellants' house, and the light from the sky comes to the bottom of them at angles, of 38° 47′ and 39° 20′. There is no rule that entitles ancient light to access of light at an angle of 45°.

(1) (1901) I. L. R. 23 All., 465.
(2) (1904) Law Reports, A. C. 179.

1912.

HAJEE AHMED MOOLLA DAWOOD v. POKER-MULL.

None of the witnesses said that the diminution of light would be such as to make occupation of the house uncomfortable. It is clear that the appellant's right had not been infringed at the time of the application. I would dismiss the appeal with costs—3 gold mohurs Advocate's fee.

Hartnoll, J.—I concur.

Civil Miscellaneous Appeal No. 121 of 1911.

May 9th, 1912.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

P. H. RIPLEY *v.* V. J. NAHAPIET.

Noyce—for appellant (defendant). | *J. R. Das*—for respondent (plaintiff).

Arbitration—award—order of Court setting aside award—right of appeal—section 11 (2), Arbitration Act, 1899—section 4, section 89 and section 104 (1) (f), Civil Procedure Code.

No appeal lies against an order under the Arbitration Act, 1899, setting aside an award.

The parties who are residents of Rangoon referred a dispute between them to an arbitrator without the intervention of the Court.

The arbitrator made his award and in pursuance of sub-section (2) of section 11 of the Indian Arbitration Act, 1899, caused it to be filed in Court. The respondent on this appeal applied to the Court to set it aside, and after hearing the parties the Court set it aside.

The appellant in whose favour the award was appeals against the order.

Objection has been taken by the respondent that no appeal lies against an order under the Arbitration Act, setting aside an award. For the appellant it has been urged that clause (*f*) of sub-section (*1*) of section 104 of the Civil Procedure Code gives an appeal because the order was in effect an order refusing to file an award.

The section however only applies to arbitrations under the Code. The procedure for filing an award under the Arbitration Act is different from that under the Code: under the former the arbitrator files the award, under the latter the Court files it. Section 89 of the Code especially excepts the procedure of the Code from arbitrations under the Arbitration Act, and section 4 of the Code does the same thing generally.

No appeal lies unless it is given by law. There is no provision in the Arbitration Act giving an appeal from an order setting aside an award. We consequently hold that this appeal does not lie : it is dismissed with costs.

Full Bench—(Criminal Reference).

Criminal, Reference No. 26 of 1912.

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, Mr. Justice Robinson, Mr. Justice Parlett and Mr. Justice Young.

GURUDIN TELI *v.* S. MUTU SERVAI.

S. S. Halker—for applicant. | *A. B. Banurji*—for respondent.

Breach of contract by workmen—completion of work—expiry of term of contract—optional remedies—object of the Workmen's Breach of Contract Act—sections 1 and 2 of the Workman's Breach of Contract Act, 1859.,

The following reference was made to a Full Bench under section 11, Lower Burma Courts Act.

In a case where either the work has been completed or the term of the contract has expired has a Magistrate jurisdiction to entertain a complaint under section 1 and to order repayment of the advance under section 2 of Act XIII of 1859?

Held,—that although one object of the Act may have been to provide a speedy remedy for employers against workmen, the main object was to provide for the punishment of workmen who have taken advances and have fraudulently broken their contracts to work. The reference was, therefore, answered in the affirmative.

Maung Tun v. *Fazil Kadre*, (*1904-06*) 1 U.B.R., 1; *Q. E.* v. *Junno*, Sind Sadar Court Cr. Rul. No. 53, dated 28th October 1904; *Narsing Prosad Singh* v. *King-Emperor*, XII C.W.N. 869; *V. N. Ramasawmy Pillay* v. *A. Amanadar*, 4 L. B. R., 270; referred to. *In re Anusoori Sanyasi*, I L.R. 28 Mad., 37; *Khola Buksh* v. *Moti Lall Johori*, XI C.W.N., 247; dissented from.

The following reference was made to a Full Bench by Mr. Justice Parlett:—

March 22nd, 1912.

On 4th October 1911 complaint was made that Gurudin Teli had on 5th October 1908 received an advance of Rs. 200 on a contract signed by him to work as a mill cooly and bring fifty other coolies to work for complainant from 1st January to 31st December 1909; that he absconded and neither worked nor supplied coolies and that complainant was unaware of his whereabouts till shortly before the complaint was laid.

Respondent admitted signing the contract and also admitted its terms save that he said he received only Rs. 150 and undertook to supply only twenty coolies; but he alleges that he worked for three months and thereby cleared off the amount of his advance.

The Magistrate found for the complainant on the facts and ordered the respondent to return Rs. 200 to the complainant within seven days.

Respondent applies for revision of this order on the grounds (1) that he is only a contractor and the Act is not applicable to him and (2) that as the term of the contract had expired and the work had been performed before the complaint was made, the Magistrate had no jurisdiction under the Act. The first ground is untenable. Even if respondent were merely a supervisor of other coolies, he might still be a workman or labourer within the

1912.

GURUDIN TELI v. S. MUTU SERVAI.

meaning of the Act, see *Maung Tun* v. *Fazil Kadre* (1). But the contract clearly stipulates and the respondent himself admitted that he was to work with his own hands.

In support of the second ground the case *In re Anusoori Sanyasi* (2) is quoted. It was there held that section 2 of the Act only applies when the work is uncompleted when the complaint is made. If the work has been completed when the complaint is made the Magistrate has no jurisdiction. In the course of the various judgments delivered the following remarks occur:—

"An employer by doing the work himself or employing a third party to do it loses his right to proceed under the section.

* * * * *

"The plain object of the Act is to provide a speedy remedy when the work is not done." "The section presupposes that at the time the defaulter is brought before the Magistrate the complainant has an option either to demand back the advance, or to get an order to have the work completed. But if the work has been already completed complainant cannot ask for an order to have it completed. He has therefore no option and the condition presupposed by section 2 does not exist and the remedy by the Act cannot be applied."

I find that this ruling has not always been followed. Thus in *Q. E.* v. *Junno* (3) the report of which is not available but which is quoted at page 10 of Jagtiani's Workman's Breach of Contract Act, 1905 Edition, where a Magistrate refused to entertain a complaint on the sole ground that the complainant had got the work done through other agency before filing the complaint, it was held that it is only where the employer has allowed the workmen with whom he originally contracted to complete the work, even after the time agreed upon has expired that no prosecution will lie against them under Act XIII of 1859.

In *Narsing Prosad Singh and others* v. *King Emperor* (4) of the two learned Judges composing the Bench one held that "the remedies under section 2, Act XIII of 1859, are interlocked and interdependent and if one has lapsed the other has lapsed also:" the other held a different view and in the course of his judgment says as follows:—"I cannot see why the expiration of the term of the contract should deprive the complainant of his right to exercise his option of asking for the recovery of the money he advanced. The option between the two remedies is that of the complainant and not that of the person complained against and the fact that one remedy would be infructuous does not seem to me to deprive him of the other. I consider that the complainant's right to recover the money he has advanced

(1) (1904-06) 1 U.B.R., 1. (2) I.L.R. 28 Mad., 37.
(3) Sind Sadar Court Cr. Rul. No. 53, dated 28th October 1904.
(4) 12 C.W.N. 869.

continues till it is repaid to him subject to the effect of the Limitation Act of which there is no question here." He expressly dissented from the ruling in *Khoda Buksh* v. *Moti Lal Johori* (5) that the term of the contract having expired the contract cannot be specifically enforced and the money recovered under the Act before a Magistrate but the Bench being divided in opinion that ruling was followed. It has also been dissented from by this Court in *V. N. Ramasawmy Pillay* v. *A. Amanadar* (6) where the complaint was made, though the respondent did not appear before the Magistrate, before the term of the contract expired. To this extent therefore the Madras ruling is inapplicable to this province. In the present case however the complaint was not made till long after the term of the contract had expired and if the Madras and the earlier Calcutta case be followed the Magistrate had no jurisdiction to entertain the complaint. Those rulings are based upon the principle quoted above that " the remedies under section 2 are interlocked and if one has lapsed the other has lapsed also " and this appears to have been inferred from the fact that section 2 gives the complainant an option between two remedies. It is argued that the Act applies only so long as this option is capable of being exercised. Inasmuch as section 2 where alone the option is mentioned refers to a stage of the proceedings when the workman has already been brought before the Magistrate, the logical conclusion is that unless at the time the defaulter is brought before the Magistrate the option still exists the remedy by the Act cannot be applied. This Court has already decided against this sweeping conclusion where the complaint has been made but the respondent has not appeared before the expiry of the term of the contract (6). I am doubtful whether in other cases too it is sound. Supposing that the contract is for repairs to a house, and that before the defaulter can be brought before the Magistrate the house is burnt down. I find nothing in the Act to indicate that this disaster deprives the unfortunate employer of the benefit of a summary order under section 2 to repay the advance. Nor can I see that where the work is of an urgent nature, such as, *e.g.*, repairs to a roof in the rainy season, the employer if he wishes to proceed under the Act is bound to leave the repairs undone until he can trace and produce before the Magistrate a rogue who has swindled him; nor that if he gets the repairs done by somebody else he thereby deprives himself of the right of lodging a complaint under the Act and asking for an order for the repayment of his advance.

Reading section 2 as a whole and together with the rest of the Act, I think the words " at the option of the complainant " in section 2 are inserted for the purpose of making it incumbent on the Magistrate in cases where it is possible to order either a refund of the advance or performance of the work to comply

(5) 11 C.W.N., 247. (6) 4 L.B.R., 270.

1912.

GURUDIN TELI v. U TU SERVAI.

with the wish of the complainant in the matter. But for these words the matter would rest with the Magistrate's discretion; their insertion merely takes away that discretion. I doubt whether their insertion was intended to imply that in cases where for any reason it is not feasible to order the completion of the work the complainant loses his right to proceed under the section to obtain an order for the repayment of the advance. The objects of the Act are clear from the preamble, namely, to prevent loss and inconvenience sustained by employers from fraudulent breach of contract on the part of workmen who have received advances; to supplement by a summary remedy the employers' wholly insufficient remedy by suit for damages and to punish persons guilty of such breach of contract. To place on section 2 the narrow construction contended for would, I consider, largely defeat these objects and render the Act in many cases nugatory for the purpose of protecting and assisting those persons whom it was intended to protect and assist.

As however there is in applicant's favour a decision of a Full Bench of the Madras High Court, under section 11 of the Lower Burma Courts Act, 1900, I refer for the decision of a Bench or of a Full Bench, as the Chief Judge may direct the question :—

"In a case where either the work has been completed or the term of the contract has expired has a Magistrate jurisdiction to entertain a complaint under section 1 and to order repayment of the advance under section 2 of Act XIII of 1859?"

The opinion of the Full Bench was as follows:—

May 9th, 1912.

Fox, C.J.—In my opinion the answer to the question referred should be in the affirmative.

With due respect to the opinions of the learned Judges of the Madras High Court in the case quoted in the reference order, it appears to me that they have read into the Act a provision which is certainly not expressed in it, and which does not appear by necessary implication to be involved in anything expressed.

One object of the Act may have been to provide a speedy remedy for employers against workmen, who have taken advances from them on account of work, but the main object was, as the preamble shows, to provide for the punishment of workmen who have taken advances, and have fraudulently broken their contracts to work.

The impossibility of the master being able to exercise the option of demanding an order from the Magistrate ordering the workman to perform the work does not appear to me to affect his right to ask for an order for repayment of the advance, and subsequently for an order for the workman's punishment by imprisonment if he fails to comply with the order.

Hartnoll, J.—I concur.

Robinson, J.—I concur.

Parlett, J.—I concur.

Young, J.—I concur.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

Civil 1st Appeal No. 119 of 1910.

May 16th, 1912.

1. RAMAN CHETTY.
2. PALANIAPPA CHETTY.
3. SRINIVASAKAN CHETTY BY THEIR AGENT P. M. R. M. PALANIAPPA CHETTY.
4. MINATCHY.
5. MUTAYA CHETTY.
6. VEERAPPA CHETTY BY HIS NEXT FRIEND MINATCHY.

v.

1. MUTHUVEERAPPA CHETTY.
2. RAMAN CHETTY BY THEIR AGENT S. M. R. M. OOLAGANATHAN CHETTY.
3. ABU BACKER *alias* LU GALE.

Lambert—for appellants (plaintiffs).

J. R. Das—for respondents (defendants).

Attachment—cross claims—res judicata—inconsistent and contradictory state of affairs—finality of decision—section 11, Civil Procedure Code 1908.

A obtained a decree against B and attached 8,000 baskets of paddy in execution of the decree. C applied for removal of attachment. In this proceeding it was found that 2,850 baskets of the attached paddy belonged to B and the rest to C.

Five thousand seven hundred and fifty-three baskets only were sold by the Bailiff : there was conflict as to what had become of the remainder of the 8,000 baskets attached. Of the amount realized by sale of the paddy A withdrew a part and B wrongly withdrew the balance.

C then brought a suit against A, and A brought a suit against B and C. In both cases it was decided that 5,100 baskets of the attached paddy belonged to B. In C's suit against A, it was held that the remainder of the 8,000 baskets belonged to C, but C could not recover its value from A. In A's suit against C it was held that C had taken the excess paddy over the 5,753 baskets sold by the Bailiff : a decree was given in A's favour against B and C for the amount which had been wrongly drawn from Court by B. C appealed against the decree in the suit brought by him but did not appeal against the decree in the suit brought by A. It was argued that as C had not appealed against the decree in the cross suit the doctrine of *res judicata* arose and barred the appeal.

As the main issue, namely, the question of the ownership of the paddy, in both cases was the same and as the decision thereon had become final in favour of A in the suit, A *vs.* C, the result would be that if it were raised on appeal and decided in C's favour, there would be a decree in the suit brought by C, part of which would adjudge to C money which had already been adjudged to A. It was held that as this state of affairs would be inconsistent and contradictory the question of ownership of the paddy was *res judicata* and could not be further considered.

As regards the other issues in the suit, B *vs.* A, the findings thereon were not held to be *res judicata* and were decided on their merits.

Chajju v. *Sheo Sahai*, I.L.R. 10 All., 123; *Balkishan* v. *Kishan Lal*, I.L R., 11 All., 148 : *Mariamnissa Bibi* v. *Joynab Bibi*, I.L.R. 33 Cal., 1101 ; referred to. *Zaharia* v. *Debia*, I L.R. 33 All., 51, followed.

The chetty firm of S. M. R. M. brought a suit against Abu Backer *alias* Maung Lu Gale and applied for an attachment before judgment of certain paddy said to belong to him. The process-server Maung Hla Baw on the 16th February 1905 made an attachment of paddy estimated to be 5,100 baskets. Subsequently

1912.

RAMAN CHETTY v. MUTHU-VEERAPPA CHETTY.

after the S. M. R. M. firm obtained a decree it applied to attach 8,000 baskets in execution of it and the warrant of attachment shows that 8,000 baskets were attached. Maung Hla Baw says in his evidence that he attached the same paddy as he did before. At the hearing of the appeal it was not argued that only 5,100 baskets were attached, and the appeal was argued on the supposition that 8,000 baskets were attached at the second attachment and so this judgment will be written on such supposition being a fact. After the 8,000 baskets had been attached the appellants the P. M. R. M. firm—applied for removal of attachment on the ground that the 8,000 baskets belonged to them. During the continuance of the proceedings on the 18th November 1905 the attached paddy to the extent of 5,753 baskets was sold and realized Rs. 4,247-8-0. Subsequently on the 1st February 1906 it was found that of the attached paddy 2,850 baskets belonged to Abu Backer and that the rest of it belonged to the P. M. R. M. firm. Out of the Rs. 4,247-8-0 realized by the sale of the attached paddy Rs. 2,109—the money realized for 2,850 baskets—were withdrawn by the S. M. R. M. firm, and the balance was by mistake allowed to be withdrawn by Abu Backer.

The appellants then brought a suit against the S. M. R. M. firm alleging that the 8,000 baskets belonged to them. They alleged that the rate realized at the sale of the attached paddy was too little and that the market rate was then Rs. 106 per 100 baskets. They therefore asked for a decree for Rs. 8,480 or in the alternative for a decree against the S. M. R. M. firm for Rs. 2,109—the sum withdrawn by them—and for Rs. 4,232-4-0 the difference between the price of 8,000 baskets at the rate of Rs. 106 per 100 baskets and the sum realized at the Court Sale and for a decree against Abu Backer for Rs. 2,138-12-0 the sum wrongly withdrawn by him. This suit was filed on the 10th April 1906. On the 24th May 1906 the S. M. R. M. firm brought a suit against the P. M. R. M. firm in respect of the same paddy asking for a declaration that the 5,150 (8,000—2,850) released from attachment belonged to Abu Backer and that they were entitled to get the Rs. 2,038-9-0 deposited in Court—*i.e.*, the value of the paddy realized at the Court Sale other than the value of Rs. 2,850 baskets declared to belong to Abu Backer,—and also for a decree for Rs. 1,672-6-0 the price of 2,260 baskets (8,000—5,740, the quantity said to have been sold at the Court Sale) on the ground that after the attachment the P. M. R. M. firm had taken away and misappropriated this amount. The evidence recorded in the suit brought by the P. M. R. M. firm was taken as evidence in the suit brought by the S. M. R. M. firm and the results of the two suits were as follows:—

In the suit brought by the P. M. R. M. firm it was found that of the 8,000 baskets attached 5,100 baskets belonged to Abu Backer and that the remainder of the paddy attached belonged to the P. M. R. M. firm ; but with regard to this balance it was also found that the P. M. R. M. firm had no right to recover its

value as they could not prove that it was stolen while under attachment and also they had been selling paddy out of the granary where the attached paddy lay that may have been some of that attached. As 5,753 baskets were sold and only 5,100 baskets were found to belong to Abu Backer they were given a decree for the value of the difference—673 baskets—at Rs. 90 per 100 baskets which was found to be a fair value to take.

In the S. M. R. M. case against the P. M. R. M. firm it was found that out of the 8,000 baskets attached 5,100 baskets belonged to Abu Backer and that the P. M. R. M. firm took and misappropriated the paddy attached and that was in excess of the paddy sold by the bailiff; and it was decreed that the 5,100 baskets which were released from attachment in the Civil Miscellaneous Case was the property of Abu Backer and that the S. M. R. M. firm were entitled to get Rs. 2,038-9-0 the balance of the sale proceeds deposited in Court which were withdrawn by Abu Backer—from him and the P. M. R. M. firm.

This decree appears to be wrong in stating that 5,100 baskets were released from attachment in the Miscellaneous Case. The order in that case released no paddy from attachment but declared that 2,850 baskets of the attached paddy belonged to Abu Backer.

The P. M. R. M. firm now appeal against the decree that was passed in the suit brought by them, and a preliminary objection was raised to the appeal on the ground that they have not appealed against the decree brought in the cross suit and so the doctrine of "*res judicata*" comes in and bars this appeal. Our attention was drawn to the cases of *Chajju* v. *Sheo Sahai* (1), *Balkishan* v. *Kishan Lal* (2) and *Mariaminissa Bibi* v. *Joynab Bibi* (3). There has been a later case in which all these decisions have been further considered and that is the case of *Zakaria* v. *Debia* (4).

In order to come to a decision on this objection it is necessary to set out exactly what the issues were in the two suits and which were commom to both, and how the decrees were arrived at. In the suit brought by the P. M. R. M. firm the main issues were—

(1) To whom did the 8,000 baskets belong—to the P. M. R. M. firm or to Abu Backer?

(2) If the 8,090 baskets were proved to belong to the P. M. R. M. firm, were the S. M. R. M. firm liable to the P. M. R. M. firm for the difference in baskets of paddy between the 8,000 baskets attached and the amount sold by the bailiff?

(3) If the P. M. R. M. firm were entitled to a decree at all, should they be allowed it at the rate of Rs. 106 per 100 baskets whice was a rate far in excess of Rs. 74, the price realized at the Court sale?

In the result it was found on the first issue that 5,100 baskets

(1) (1887) I.L.R. 10 All., 123. (2) (1888) I.L.R. 11 All., 148.
(3) (1906) I.L.R. 33 Cal., 1101. (4) (1910) I.L.R. 33 All., 51.

1912.

RAMAN CHETTY v. MUTHU-VEERAPPA CHETTY.

belonged to Abu Backer on the second in favour of the S. M. R. M. firm, and on the third that Rs. 90 per 100 baskets was a fair value to allow. So the P. M. R. M. firm obtained a decree for 653 baskets—the difference between the amount sold 5,753 and the amount held to belong to Abu Backer 5,100.

Their grounds of appeal are that it should have been held that the 8,000 baskets all belonged to them, that the S. M. R. M. firm and not they are responsible for the difference between the 8,000 and the amount sold, and that they should have been allowed Rs. 105 per 100 baskets.

As regards the suit brought by the S. M. R. M. firm the main issues were—

(1) To whom did the 8,000 baskets belong—to Abu Backer or the P. M. R. M. firm?

(2) If the 8,000 baskets were found to belong to Abu Backer, were the S. M. R. M. or the P. M. R. M. firm liable for the shortage between 8,000 baskets and the amount sold?

The finding on the first issue was that 5,100 baskets belonged to Abu Backer and on the second that the P. M. R. M. firm took and appropriated the difference between the 8,000 baskets and the amount sold. In view of the finding on the first issue it was not necessary for the decision of the suit to come to a finding on the second. The shortage owing to the finding as to the amount owned by Abu Backer in any case would be held to belong to the P. M. R. M. firm and so the S. M. R. M. firm could not get it. The decree was based on the first issue; but even then it seems to be wrong. The balance of the sale proceeds Rs. 2,038-9-0 awarded by it *plus* the sum withdrawn by the S. M. R. M. firm Rs. 2,109 comprised together according to the plaint the value of the 5,740 (in reality it was 5,753) baskets sold and owing to the finding that Abu Backer only owned 5,100 the S. M. R. M. firm should not have been given the whole of the balance Rs. 2,038-9-0 but only so much of it as went to make up the value of 5,100 baskets. But that decree has not been appealed and it is this fact that it is urged renders the present appeal barred as *res judicata*.

Section 11 of the Civil Procedure Code is as follows:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court" and Explanation 1 to the section which is new is:—

"The expression 'former suit' shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto."

I may say here that I am in complete agreement with the exposition of the law as laid down in *Zaharia* v. *Debia* (4), and

with the following passage in Mahmood, J's' judgment in the case of *Balkishan* v. *Kishan Lal* (2).

"It seems to me that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants, *ne autem lites immortales essent, dum litigantes mortales sunt.* This saying of Voet is in accord with the maxims *nemo debet bis vexari pro unaet eadem causa*, and the broader maxim *interest reipublicæ ut sit finis litium*, This being so, the doctrine so far as it relates prohibiting the re-trial of an *issue*, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a *final* judgment pronounced meanwhile in such previous litigation by a competent Court (the identity of parties and other conditions being satisfied) should operate as *res judicata* preventing the Judge dealing with the later litigation from adjudicating differently. If this not done, it seems to me that the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated. So far as the justification of this view from the provisions of the Civil Procedure Code is concerned, I may say that the rule contained in section 13 is not limited to the Courts of first instance, that it applies equally to the procedure of the first and second appellate Courts by reason of sections 582 and 587 respectively, and, indeed, even to miscellaneous proceedings by reason of the general provisions of section 647 of the Code." The new explanation to section 11 of the Code may have been added so as to settle the law on the subject.

In that there was no appeal by present appellants in the suit brought by the S. M. R. M, firm it seems to me that they cannot now again attack in appeal the finding that 5,100 baskets of the attached paddy belonged to Abu Backer. The issue as to the ownership of the paddy was common to both suits. It was decided in both suits. The finding on it has become final in the suit brought by the S. M. R. M. firm and so acts as *res judicata* in the present appeal. If it were allowed to be raised in the present appeal and decided in appellant's favour, there would be a decree in the suit brought by the P. M. R. M. firm part of which would adjudge to them money (*i.e.*, the value of the balance of the price of the baskets sold by Court after deducting the value of 2,850 baskets already received by the S. M. R. M. firm) which has already been adjudged to the S. M. R. M. firm in a decree which has become final and cannot be set aside. Such a condition of affairs would be contradictory and inconsistent. I would therefore hold that as regards the question of ownership of the 8,000 baskets the matter is *res judicata* and cannot be further considered.

The second ground of appeal concerns liability for the shortage between the 8,000 baskets attached and those sold

1912.

RAMAN CHETTY v. MUTHU-VEERAPPA CHETTY.

5,753. This issue was common to both suits and was decided in favour of the S. M. R. M. firm; but as it was not necessary to come to a decision on it in the suit brought by the S. M. R. M. firm for the reason which I have already given, it cannot be said to have been substantially in issue in that suit. Though a finding was arrived at with regard to it in the suit brought by the S. M. R. M. firm such a finding had no influnce on the decree that was passed, nor was it a finding that the P. M. R. M. firm could appeal as the decree was not affected by it. Immediately there was a finding that only 5,100 baskets belonged to Abu Backer the issue as to the responsibility for shortage became no longer an issue necessary for the disposal of the suit. The finding on it therefore in my opinion does not act as *res judicata* for the purpose of this appeal. It is necessary therefore to consider this ground. Appellants' counsel could not seriously argue it. Appellants allege that there was a theft while the paddy was under attachment. The evidence as to theft was of the vaguest description. No report was made to the police. From the evidence not more than some 500 baskets could have been abstracted in this manner. Nga Lun says that appellants' agent sold paddy out of the godown in which the attached paddy was. The ground cannot prevail.

The third ground is as to the price of paddy that was allowed by the District Court. This matter was not substantially in issue in the suit brought by the S. M. R. M. firm. They only asked for a rate at Rs. 74. It is the P. M. R. M. firm who ask for Rs. 105. For the same reasons as I have given in considering the second ground I would hold that the decree passed in the suit brought by the S. M. R. M. firm does not bar its consideration in the decision of this appeal. Looking at the evidence Rs. 90 seems to be a fair price. Rupees 74 were obtained at the auction. Tha Lin says he paid Rs. 85 or Rs. 90 in Kason or Nayon. Though Maung Pon and Ma Mo depose to a price of Rs. 107 and Rs. 105, I think that Rs. 90 was a fair price to allow.

I would therefore dismiss the appeal with costs.

Fox, C. J.—I concur.

Civil 1st Appeal No. 86 of 1910.

May 20th, 1921.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Harnoll.

1. SAN U
2. PO NGO

v.

1. MA HMYIN.
2. KAN AYE.

Ginala—for appellants. | *Dantra*—for respondents.

Verbal sale of an interest land in Rangoon—validity of sale—law applicable—Transfer of Property Act, 1882—section 13, Burma Laws Act, 1898.

On the question as to whether a verbal sale of an interest in land in Rangoon for a sum exceeding Rs. 100 effected prior to the extension of the

Transfer of Property Act to Rangoon was valid, it was held that as the law to be applied under sub-section (2) of section 13 of the Burma Laws Act, 1898, is the law for the time being administered by the High Court of judicature at Fort William in Bengal and as the Transfer of Property Act, 1882, applied to the whole of Bengal at the time of the verbal sale, that sale was invalid.

Fox, C. J.—The suit was for a declaration of ownership of a share in land within the limits of the Rangoon Municipality, and for an injunction restraining the defendants from interfering with the plaintiffs and their tenants in the possesion of the land and from trespassing on it.

The plaintiffs relied on a verbal sale for Rs. 350 by the defendant's father to their parents of his share in the land, effected in the year 1890 before the Transfer of Property Act had been extended to Rangoon.

That Act was first extended to Rangoon or more correctly to the area within the local limits of the ordinary Civil Jurisdiction of the Recorder of Rangoon as from the 1st January 1893 by Judicial Department Notification No. 236 of 1892, dated the 20th June in that year.

The first question which arises is whether a verbal sale of land or of an interest in land within the then Municipal limits of Rangoon which were within the Civil Jurisdiction of the Recorder was valid or not.

Section 13 of the Burma Laws Act, 1898, states the law to be applied to the question. Since no question of succession, inheritance, marriage or caste or any religious usage or institution is concerned, Buddhist law is not applicable to the case although the parties are Buddhists.

Sub-section (2) of the section enacts that subject to the provisions of sub-section (1) which declares what laws are to be applied when questions regarding succession, etc., arise, and subject to provisions of any enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary civil jurisdiction.

Taking it that the law to be applied was that in force at the time of the verbal sale, the Calcutta High Court then administered the Transfer of Property Act, since the Act applied to the whole of Bengal from the date (the 1st July 1882) on which it came into force. Consequently a verbal sale of an interest in land for over Rs. 100 being invalid in Calcutta in 1890, it must be held that a verbal sale of an interest in land for over Rs. 100 in Rangoon was also invalid at that time, although the Transfer of Property Act had not been then extended by the Local Government to Rangoon.

I do not think it necessary to consider what law was applicable in Calcutta to transfers of land in it before the

1912.

SAN U v. MA HMYIN.

Transfer of Property Act was passed. A very interesting note by Mr. Whitley Stokes, printed in the preface to the Government's Collection of Statutes relating to India, issued in 1881, contains much information on the subject as does Chapter IV of Sir Courtenay Ilbert's "Government of India." It may be noted that sections 1, 2, 3, 4 and 17 of the Statute of Frauds were not repealed until 1872, when these were repealed by the Indian Contract Act as from the 1st September 1872.

The basis of the plaintiffs' suit not having given them a title to what they claimed, I would allow the appeal, reverse the decree of the Original Court and dismiss the suit with costs. I do not see any sufficient ground for departing from the ordinary rule and would order the plaintiffs to pay the defendant's costs of this appeal.

Hartnoll, J.—I concur.

Full Bench.

Criminal Appeal No. 119 of 1912.

May 23rd, 1912.

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, Mr. Justice Robinson, Mr. Justice Parlett and Mr. Justice Young.

TUN BAW *v.* KING-EMPEROR.

The Assistant Government Advocate—for the King-Emperor.

Drunkenness—voluntary and involuntary—general exception in Indian Penal Code—particular knowledge or intent—liability of drunken person—knowledge distinguished from intent—degrees of intoxication—determination of intention—sections 85, 86, 383, 387, 393, 398, Indian Penal Code, 1860—section 105, Indian Evidence Act, 1872.

A was convicted under sections 393 and 398, Indian Penal Code, of attempt at extortion amounting to robbery on the facts that he threatened to cut B and C with a dah which he brandished unless they gave him money. He pleaded drunkenness in defence.

The question of how far the drunkenness of an accused may be taken into consideration in connection with an alleged offence was considered.

Held,—that the drunkenness of an accused person at the time he committed the act, charged as an offence, may be and should be taken into consideration in cases where intention on the part of the accused is necessary to constitute the offence charged, and that the intention which would be ascribed to a sober man in connection with an act must not necessarily be ascribed to a drunken man who does the same act. The question of intention must be determined in each individual case according to the actual facts proved according to accepted principles.

The omission of any express provision, in section 86 of the Indian Penal Code, regarding the intention which is to be attributed to a drunken man doing an act which is an offence when done with a particular knowledge or intent leaves it open to the Courts to deal with the question of intention on the general principles of law.

In the case of A, it was decided that he was not at the time he committed the alleged offence intoxicated to such a degree that he did not know what he was doing, or that he did not intentionally act as he did, or that indulging in the conduct he did he did not intend to cause wrongful loss to B and wrongful gain to himself. As however reasonable doubt existed as to whether the conditions necessary to constitute, the offence an attempt at

robbery were fulfilled, the conviction was altered to one under section 387, Indian Penal Code.

Crown v. *Tha Sin*, (1902) 1 L.B.R., 216 ; *King* v. *Meade* (1909) I K.B. D., 895 ; *J.M.* v. *King-Emperor*, (1910) U.B.R., 2nd Quarter, 17 ; *Reg.* v. *Doherty*, (1887) 16 Cox's Cr. C., 306 ; referred to.

Fox, C. J.—The facts to be dealt with are as follows. The accused from somewhere outside the complainant's house called out to him by name "Tha Ban." The complainant did not answer. The accused then indulged in abusive language, took off a vest he was wearing, and went up on to the complaint's house having a dah in one hand. He called out " Rich man, will you give me money or not ? If you do not give me money I will cut you and your wife." The door of the inner room in which the complainant, his wife and daughter were was closed against him. He kicked at it and slashed at it with his dah. He threatened with the dah two relatives of his who were paying a visit at the house, and told them not to leave it. He then went downstairs to another door using words of bravado, and called to a man Sein Tin to come up on the house. He slashed and kicked at the second door, and on it opening he fell down. The complainant, his wife and daughter had fled through the back part of the house. The complainant ran to the headman's house to report. The headman sounded his gong and a large number of villagers assembled. From the headman's house the accused could be heard stamping about and using abuse in the complainant's house. When however the villagers approached it, the accused ran away leaving his dah and vest in the house. He was found in his father's house either asleep or so drowsy that he had to be roused. In the headman's opinion he was drunk. He apparently could not get up without assistance and when up he vomited : he had to be supported to the headman's house and there he again vomited. He did not answer questions or even speak on that night. From enquiries the headman ascertained that he had been drinking toddy.

The accused was charged with having attempted to commit robbery armed with a deadly weapon.

The accused's defence was that he was drunk and did not know what he did on the evening in question.

He was convicted and sentenced to seven years' trnsportation in lieu of seven years' imprisonment which is the minimum punishment under section 398 of the Indian Penal Code.

The accused appeals on the ground that he was drunk at the time, and did not know what happened, and therefore could not have committed an offence or should not be bunished for what he may have done.

The case affords an opportunity for reconsidering the question of how far the drunkenness of an accused can be taken into consideration in connection with the offence charged against him.

1912

TUN BAW v. KING-EMPEROR.

The provisions of the Penal Code bearing on the matter are as follows :—

"85. Nothing is an offence which is done by a person who at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law: *provided that the thing which intoxicated him was administered to him without his knowledge or against his will.*

"86. In cases where an act is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will."

These sections are in the Chapter of the Code dealing with "General Exceptions," and according to section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within any of the exceptions lies on the accused, the Court being bound in the first instance to presume the absence of such circumstances.

Section 85 protects an accused who can substantiate that when he committed the act charged against him he was in such a state of intoxication, in consequence of something administered to him without his knowledge or against his will, that he was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law.

Further, if an accused can show that he was intoxicated at the time he committed the act and that the thing which intoxicated him was administered to him without his knowledge or against his will, he is not liable under section 86 to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. The case of the man made drunk by another or others without his knowledge or against his will is free from difficulty, but such a case rarely occurs.

Cases of men who have made themselves drunk occur very frequently, and the application of section 86 of the Indian Penal Code to such cases very often presents very great difficulty.

Analysing the section, the opening words of it, "In cases where an act done is not an offence unless done with a particular knowledge or intent" govern the whole section. On first thought they may appear to limit the applica ion of the section to a small number of cases, for usually most acts charged as offence speak for themselves, and the idea of their not being offences at all unless done with a particular knowledge or intent scarcely strikes the mind. The Penal Code does not require any particular knowledge or intent to be shown in connection with some acts in order to constitute them offences, but in the majority of offences it requirses that acts in order to constitute offences must have been done with some specified knowledge or intent. This is so even in some of the most obvious of cases : for instance, if a stranger puts his hand

into my pocket, takes my money from it and runs away with it, in order to constitute his act of taking my money without my consent, an offence, the Penal Code requires that he must have done it with the intention of causing wrongful gain to himself or wrongful loss to me. Although one or both of such intentions is in ordinarily occurring of the description almost inseparable from the act, still by drawing on the imagination one might conceive a case in which a stranger might take my money from my pocket without the specified intention, and in such case he would not commit the offence of theft.

All puzzling over the opening words of the section, and the applicability of it to any particular case, may be avoided by reading them by the light of the marginal note. *viz*, offence requiring a particular intent or knoweledge committed by one who is intoxicated : " this shows that the section was intended to apply to all cases in which the law requires acts to have been done with a particular (which I take to be synonymous with "specified") knowledge or intent in order to constitute them offences.

It may next be noted that this section does not refer to any degree of intoxication, as section 85 does. The man who has by his own act made himself so drunk as to be incapable of knowing what he is doing, or whether he is doing what is wrong or contrary to law, is left in the same position as the man who has made himself only slightly intoxicated.

That position is that he is liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. This I take to mean that wherever knowledge you would have attributed to the accused if he had been sober you must attribute to him although you may be of poinion that he was drunk when he did the act charged as an offence.

The section however does not say that the man who has made himself drunk shall be liable to be dealt with as if he had the same intent as he would or must have had if he had been sober. This is omitted although the opening words of the section profess to deal with cases in which an act done is not an offence unless it was done with a particular intent as well as with cases in which an act done is not an offence unless done with a particular knowleged. No express provision is made as to how the question of the intention of a person doing an act, which if done with a particular intent is an offence, is to be dealt with, and hence arises a serious difficulty which is left to Judges as interpreters of the law to solve.

It cannot be supposed that the omission by the Legislature to provide an express provision for the case of intent was accidental. The question then is-- how is the intention of a person who has made himself drunk and in that state has done something which if done by a sober man would be an offence, by reason of an intent being imputed to him, to be dealt with ?

1912.

TUN BAW
v.
KING-EMPEROR.

In the *Crown* v. *Tha Sin* (1) Mr. Mayne's views on section 86 expressed in paragraph 201 of his Criminal Law of India were adopted as a correct exposition of the effect of the section. Amongst his remarks he says that "there seems no reason to suppose that the framers of the Code proposed to introduce a different rule from that of the English law" and "as the drunkard is assumed to have had the knowledge, he must necessarily be assumed to have had the intention, since, assuming the knowledge, the law will allow no other explanation of the act to be given." The learned Commentator no doubt qualified this statement to a certain extent, but in the light of a recent decision in the Court of Criminal Appeal in England as to the English law on the subject it may be questioned whether his statement of the law was quite accurate and whether the above last-quoted extract was not too broad a statement.

In the *King* v. *Meade* (2) in the Court of Criminal Appeal in England *Darling, J.*, who delivered the judgment of the Court, said "Originally the law was that an insane person was not liable to the same consequence and ought not to be judged by the same standard as a sane one, yet, if he was suffering from dementia affectata, that is a temporary insanity caused by the accused's own voluntary act in getting drunk, then drunkenness was no excuse for the crime. * * * The law stood thus for many years, and, as far as we know, the point was first decided in a contrary sense in *Rex* v. *Grindler* decided in the year 1819. Since then there have been many decisions in which Judges have attempted to express the doctrine that where intent is of the essence of a crime with which a person is charged, that intent may be disproved by showing that at the time of the commission of the act charged the prisoner was in a state of drunkenness in which state he was incapable of forming the intent." The charge against the prisoner in the case was of murder, in which intent is of the essence of the offence. He gave the decision of the Court in the following words :—

"We desire to state the rule in the following terms. A man is taken to intend the natural consequences of his acts. This presumption may be rebutted (1) in the case of a sober man in many ways : (2) it may also be rebutted in the case of a man who is drunk by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury. If this be proved the preumption the he intended to do bodily harm is rebutted."

The learned editors of the 7th edition of Russell on Crimes state that there is no reported decision in England on the question whether drunkenness can be considered as negativing the animus furandi in larceny.

They go on to remark that "The English rule as to the effect

(1)(1902) 1 L.B.R., 216. (2) (1909) 1 K.B.D., 895.

of drunkenness on criminal responsibility seems to have been correctly laid down in a recent New Zealand case. The indictment contained two counts: (1) for stealing tobacco and cigarettes in a store; (2) for breaking into the store with intent to steal. The defence was that the defendant was so drunk as not to be responsible. *Cooper, J.*, charged the jury as follows: " If a man chooses to get drunk, it is his own voluntary act. In cases however, where intention is the main ingredient in an offence, drunkenness may under certain circumstances amount to a sufficient defence. In the first count, alleging an actual theft, you must be satisfied that the prisoner, it he took the cigarettes, did so with a fraudulent intent: and in the second count, the intent is the sole ingredient of the alleged offence. The offence would not be complete under the second count unless the store was broken into by the prisoner with intent to commit an offence. If that intent existed it does not matter whether the prisoner was drunk or sober, for a criminal intent may exist in the mind of an intoxicated person, and if so his drunkeness is no excuse. But if the drunkenness is such as to take away from his act all criminal intent, then his act is not criminal. If the prisoner blundered into the store through a drunken mistake, and under such circumstances as to indicate inability to form a definite purpose, and especially to form the purpose of committing a larceny then he ought to be acquitted. If on the other hand he was not so intoxicated as to be unable to form such purpose, and knew what he was about, then his partial intoxication will not excuse him." *

The circumstances were apparently somewhat similar to those in the case of *J. M.* v. *King-Emperor* (3) in Upper Burma. The result of the New Zealand case was that the jury found that the prisoner had blundered into the store under a drunken mistake and without any intention to commit an offence, but that while in the store he appropriated the cigarettes and knew then and there that he was taking the cigarettes of another person. On these findings a verdict of guilty of larceny was directed. The words which the eminent exponent of the Criminal Law, Sir James Fitz James Stephen used in charging the jury in *Reg.* v. *Doherty* (4) (charged with murder) deserve attention. He said:

"The general rule as to intention is that a man intends the natural consequences of his act. As a rule the use of a knife to stab or of a pistol to shoot shows an intention to do grievous bodily harm, but this is not a necessary inference. In drawing it you should consider for one thing the question whether the prisoner is drunk or sober. It is almost trivial for me to observe that a man is not excused from crime by reason of drunkenness. If it were so, you might as well at

* Russell on Crimes, 7th Edition, Vol. I, page 89.
(3) U. B. R. 1910, 2nd quarter, 17.
(4) (1887) 16 Cox's Cr. Cases, 306.

1912.

TUN BAW v. KING-EMPEROR.

once shut up the Criminal Courts, because drink is the occasion of a large proportion of the crime which is committed: but although you cannot take drunkenness as any excuse for crime yet when the c ime is such that the intention of the party committing it is one of its constituent element, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime. If a sober man takes a pistol or a knife, and strikes or shoots at some one else, the inference is that he intended to strike or shoot him with the object of doing him grievous bodily harm. If, however, a man acting in that way was drunk, you have to consider the effect of drunkenness on his intention. In such cases a distinction of vital importance occurs to which it is necessary to point. A drunken man may form an intention to kill another, or to do grievous bodily harm to him, or he may not; but if he did form that intention, although a drunken intention, he it just as much guilty of murder as if he had been sober. * * * If you conclude that Doherty took the life of Graham by a pistol shot fired at him with intent to do grievous bodily harm, he would be guilty of murder even though he were drunk, but if his drunkenness prevented his forming such an intention, he would be guilty of manslaughter and not murder, though such an act in a sober man would prove an intention to do grievous bodily harm."

If may be gathered from the above cases that from the year 1819 the English law has been that the drunkenness of an accused person at the time he committed the act chraged as an offence may be, and should be taken into consideration on the question whether he did the act with the intention necessary to constitute the offence charged and that law does not require that the intention which would be ascribed to a sober man in connection with an act must necessarily be ascribed to a drunken man who does the same act.

The English law as stated in the above extracts appears eminently reasonable: it does not involve blind adherence to any rule of law, it recognizes that there are degrees of intoxication, and that a drunken man may have the capacity for forming the intention necessary to constitute an act an offence.

A voluntary drunkard like every other person is in the first instance presumed to have intended the natural consequenes of his act, but this presumption may be rebutted by his showing that at the time he did the act, his mind was so affected by the drink he had taken that he was incapable of forming the intention requisite for making his act the offence charged against him.

The result of such law is that the question of intention must be determined in each individual case according to the actual facts proved in the case according to the principles laid down.

The Indian law has in section 86 of the Penal Code made an express provision regarding the knowledge which should be imputed to a voluntary drunkard committing an act which is

an offence when done with a particular knowledge or intent. The effect of the omission to make any express provision regarding the intention which is to be attributed to such a man doing such an act appears to me to be that the question of intention is left to be dealt with on the general principles of law, and the general principles of Indian law on the matter do not appear to me to differ from the general principles of the English law as stated in the judgment and summings up I have quoted from.

The rule that a man is taken to intend the natural consequences of his act is, as indicated by Mr. Justice Darling, a presumption which may be rebutted by the sober man, and also by the drunken man : if the latter relies on his drunkenness as absolving him from the crime he must show that his mind was so affected by the drink he had taken that he was incapable of forming the intention necessary to constitute the offence charged against him.

In the case before us the accused was charged with attempt at extortion amounting to robbery on the facts that he called out to the complainant "Rich man, will you give me money or not? if you do not give me money I will cut you and your wife" and that he behaved in a violent manner using his dah and acting in such a manner as to lead the complainant and his wife to believe that he would carry out his threat if he could get at them, and they did not accede to his demand. Extortion is thus defined in section 383 of the Code : "Whoever intentionally puts any person in fear of any injury to that person or to any other and thereby dishonestly induces the person put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security commits "extortion." A person does a thing dishonestly when he does it with the intention of causing wrongful gain to one person or wrongful loss to another person. Extortion amounts to robbery only when the offender at the time of committing the extortion is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint. The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt or of instant wrongful restraint.

Judging from the state he was found in in his father's house not long after his behaviour at the complainant's house it is probable that he was intoxicated when at the latter's house, but it appears to me impossible to believe that he was at that time intoxicated to such a degree that he did not know what he was doing, or that he did not intentionally use the words he did and behave in the manner he did, or that by using words and indulging in the conduct he did not intend thereby to cause wrongful loss to Tha Ban and wrongful gain to himself, by putting Tha Ban in fear of injury to himself and his wife, and thereby inducing Tha Ban to give him money. It is a case

1912.

TUN BAW v. KING-EMPEROR.

of a drunken man who was not so drunk as to be incapable of forming in his mind the dishonest intention necessary to constitute the offence of extortion in case his demands had been acceded to.

There may however be reasonable doubt as to whether the conditions necessary to constitute the offence an attempt at robbery were fulfilled in the case, in view of the fact that Tha Ban and his wife were at the time the accused uttered his threat to them inside a room the door of which could be and was as a fact closed against him so that he could not get at them.

I think the accused should have the benefit of this doubt. Section 387, which provides punishment for putting a person in fear of death or of grievous hurt (not necessarily instant), appears to me to be the section most nearly applicable to the accused's words and acts and the circumstances under which they were uttered and done.

I would alter the conviction to one under that section and setting aside the Magistrate's conviction and sentence would sentence accused under section 387 of the Indian Penal Code to rigorous imprisonment for one year.

Hartnoll, J.— I have had the opportunity of reading the judgment of the learned Chief Judge, and as he has set out the facts of this case it is unnecessary to set them out again. One of the main questions for consideration is whether appellant is entitled to be acquitted on the ground that he was drunk and did not know what he was doing. Section 86 of the Indian Penal Code is the one that has to be construed in dealing with his plea, and having regard to its terms and to the rule of English law as to how far drunkenness is an excuse for crime it seems to me that there can be no doubt that the words "or intent" were deliberately omitted after the words "as if he had the same knowledge" and the inference is that, as there is no reason why the Indian law should differ from the English law in this connexion, it was intended that the same rule should be applied here as in England. The English rule has been clearly set out in the judgment of the learned Chief Judge. It may be said that knowledge and intention are so intimately connected that, if the law gives a drunken man the same knowledge as a sober one in judging his actions it follows as a matter of course that he must be given the same intention for a man's intention is only to be gathered from the working of his mind, and it is the workings of his mind that must give him his powers of reasoning from which flows knowledge ; but I do not think that this is necessarily so. To form an intention a man must necessarily have the requisite knowledge to do so ; but, if he has certain knowledge, he must to form an intention go a step further than having such knowledge—in other words he must on the knowledge he has form the intention to do a certain act ; and I think that is what section 86 aims at. It gives the drunken man the knowledge of the sober one when judging of his

actions but does not give him the same intention, it does not render him liable to be dealt with as if he had the same intent for it expressly omits to say so. As it stands amongst the general exceptions I think that it was enacted so as to form a general exception in the case of a man who has made himself voluntarily drunk to the ordinary presumption of law that is drawn when deciding whether a certain intention should be held to exist or not, where the intention is of the essence of the offence. That general presumption of law is that a man is taken to intend the ordinary and natural consequences of his acts and it is that presumption that a man who pleads drunkenness is allowed to rebut, and moreover if he pleads that through drunkenness he could not have had the intention imputed to him the burden of proof lies strictly on him to show that the ordinary presumption should not be drawn. This is laid down by section 105 of the Evidence Act. The concluding words of that section enact that the Court shall presume the absence of circumstances bringing the case within the general exception and in my opinion it cannot be too strongly laid down, that where a plea of being incapable to form an intention through drunkenness is urged, very strict proof should be insisted on, for men who have made themselves drunk should not be lightly excused the consequences of their acts. I therefore agree with the learned Chief Judge in the exposition of the law at which he has arrived, namely—in dealing with a man who raises the plea now urged in the first instance the ordinary presumption of law applies. He must be taken to intend the natural consequences of his acts ; but this presumption may be rebutted by showing his mind to have been so affected by the drink he had taken that he was incapable of forming the intention necessary to constitute the offence charged against him.

Applying this rule to the present case I can see no reason to differ from the conclusion arrived at, and the order proposed to be passed, by the learned Chief Judge.

Robinson J—I have had the advantage of reading the judgment of the learned Chief Judge and in that I concur.

The question is what is the effect of section 86 of the Indian Penal Code and I will briefly state my view of the object with which that section was enacted and as to how far it excuses certain criminal acts and to what extent it relieves the doer of responsibility.

Section 85 does not apply, I think, to a case of voluntary drunkenness at all. Voluntary drunkenness may result in such a diseased state as to amount to insanity and when this is the case section 84 would apply. We are not however in this case concerned with that matter. The question here is in respect of a temporary condition of drunkenness and with the question as to what was the intention with which the man acted when he did the acts which form the basis of the charge.

1912.

TUN BAW
v.
KING-EMPEROR.

Section 86 was, I consider, enacted to provide against a particular intention being imputed to a drunken man as a matter of course because such an intent could and would rightly be imputed to a sober man. It was in my opinion enacted to include in our Code the rule prevailing in English law. The opening words of the section are not perhaps happily chosen, but there can be no doubt that the section is intended to apply to those cases in which before a particular offence can be held to have been committed a particular knowledge or intent must be established. Where the act is done by a person in a state of intoxication he is liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. So where a particular knowledge only is essential to constitute the offence and a sober man must be held to have had that knowledge the intoxicated man can also be held to have had that knowledge.

But the Legislature in enacting this is careful not to say that he is liable to be dealt with as if he had the same intent and that although the intent is mentioned in the earlier part of the section. That this was intentionally done there can be no doubt and the result is that if a particular intent is a necessary ingredient in the offence it must be found to be present. When the defence is that owing to intoxication the accused had not the necessary intent when he did the act he must prove the intoxication and that it was of such a character that section 86 would apply, otherwise the law requires the absence of this exception to be presumed.

It must be noted further that the wording of the section is that he is "liable to be dealt with" as if he had the same knowledge as a sober man. This wording was I consider specially chosen. There are many cases in which if a certain knowledge must have been present to a sober man a certain intent must as a matter of course be held to have existed. If a man puts a pistol to another's head and blows his brains out he must be held to have known that he was likely to cause his death and as the necessary consequence of firing off the pistol is to cause death he must also further be held to have intended to cause death. If he had the knowledge merely he would be guilty of culpable homicide not amounting to murder but if he has the intent to cause death the offence is one amounting to murder. If then section 86 had said the same knowledge was to be imputed to the drunken man as to the sober one the effect would have been that the same intent would be held in such cases to have existed as a necessary consequence. This was not, however, contemplated and the words "liable to be dealt with" are employed. Thus if a drunken man did these acts he is liable to be dealt with as if he had the same knowledge as a sober man that is he is liable to be convicted of culpable homicide not amounting to murder, but if he can show that he was so drunk that he was incapable of forming the intent to cause death or that he did not so intend the intention should not be imputed to him. The state of drunkenness in which he was must be weighed: his conduct, both acts and

words, his probable motive and all the surrounding facts must be considered.

It must not be forgotten that drunken men can form intentions and act so as to carry them out but what the particular intent was must be found and in deciding what it was the fact of his being drunk can be considered in the same way as any other facts.

Section 86 embodies in my opinion the law as laid down in *Reg.* v. *Doherty* (4) and *The King* v. *Meade* (2).

In the present case I agree that the facts are as set out in the judgment of the learned Chief Judge—the man may have been very drunk and very shortly after the offence was committed was almost unconscious and practically incapable. I cannot hold that he was in such a condition at the time he did the acts that he was incapable of realizing what he was doing or of forming any intention. His conduct was sustained; his words and acts evidenced a deliberate intent; he did not attack his own relatives and he followed the complainant and his wife forcing his way through two shut doors. At the same time I think his state was such that he may be given the benefit of the doubt and for the reasons given by the learned Chief Judge I concur in holding that section 387 is the proper section under which he should be convicted. I also agree in the sentence proposed.

Parlett, J.—The first point for consideration is what is the correct application of section 86 of the Indian Penal Code to this case. That section must not be interpreted as if it were to the effect that a person voluntarily drunk must be presumed to have had the knowledge of a sane and sober man. It makes no mention of any presumption to be drawn, but says that he shall be liable to be dealt with as if, when he did the act, he had the same knowledge as he would have had if he had been sober. I think it desirable to pay close attention to the exact wording of section 86 because it does not appear to me to be in accordance with the English law as laid down in the recent case of *King* v. *Meade* (2). The rule is there stated that the presumption that a man intends the natural consequences of his acts may be rebutted "in the case of a man who is drunk by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury." Assuming that the learned Judges were referring to cases of voluntary drunkenness, it appears to me that section 86 of the Indian Penal Code expressly forbids the application of such a rule in India, and lays down that however a person's knowledge or capacity of knowing may have been affected by the drink he has taken, he is still liable to be dealt with as if, when he did the act, he had the same knowledge as he himself would in fact have had if he had been sober. What

1912.

TUN BAW v. KING-EMPEROR.

knowledge he would have had if sober is a matter of fact and open to him to prove if he can. Thus an untutored savage might prove that never having seen or heard of a firearm before he would, if sober, have been totally devoid of knowledge of its lethal properties. Usually however it will be a matter of inference, well nigh irresistible, as that any sane and sober person knows that to strike another in the face with the fist is likely to cause hurt.

The knowledge which an accused would have had in his sober state being determined, it forms an important element in deciding what was his intention in doing the act. But it is not the only one. His words and conduct as well as the other attendant circumstances must also be considered; and whereas his actual state of mind at the time of doing the act under the influence of drink is expressly excluded from consideration by section 86 when his knowledge is in question, I think it may and should be taken into account when deciding upon the intention with which his act was done. A strange man who unbidden invades a woman's house may be assumed to know that he will annoy her: that knowledge will still be imputed to him if he is voluntarily drunk, but he may, if he can, prove that his intention in entering was merely to find a place to sleep off the fumes of liquor, and the fact of his being intoxicated may be taken into account in deciding the matter.

In the present case there is no suggestion that the accused if sober would not have known both that his acts and words would put the complainant and his wife in fear of injury, and also that if he obtained the money he demanded wrongful loss and wrongful gain would be caused, and he is therefore liable to be dealt with as if, when he did the acts and uttered the words, he knew that those results would follow. In the case of a sane and sober man the only reasonable inference would be that he intended them to follow. The only circumstances I find which tend to weaken this inference are that he was distantly connected with complainant, that he actually stole nothing and that he was drunk. The first is of little weight. As to the second he only wanted money and there is no reason to suppose there was any lying about where he could get it, while it is clear that as soon as the thugyi sounded his gong accused bolted to his father's house and there composed himself to sleep. His conduct in that respect alone suffices to negative the plea which apparently he intended to set up that his mind was so obscured by drink that he was incapable of forming any intention at all. I find nothing to indicate that his intention was to cause any other than the natural and almost inevitable results of his acts and words, and I therefore consider that the intention of causing them must be imputed to him. I agree that there may be a doubt as to whether the offence of robbery by extortion was completed and concur in the proposed order and sentence.

1912.

TUN BAW
v.
KING-EMPEROR.

Young, J.—The criminal responsibility of a drunkard is dealt with in sections 85 and 86 of the Penal Code.

The former section provides that nothing is an offence which is done by a person who by reason of intoxication is incapable of knowing the nature of his act or that he is doing what is wrong or contrary to law provided that the thing which intoxicated him was administered to him without his knowledge or consent.

The latter that when an act done is not an offence unless done with a particular knowledge or intent the voluntary drunkard is to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. The proviso to the former section shows in my opinion that if the thing which intoxicated him has been self-administered or administered to him with his knowledge or consent, in other words if he is a voluntary drunkard, then though by reason of his intoxication he is as a fact incapable of knowing the nature of his act or that it is wrong or contrary to law, such incapacity so arising will not excuse him.

Offences under the Code viewed in connection with these two sections would seem to fall into various classes. The first consists of those acts which in order to be offences are not declared to require any intention or any knowledge on the part of the agent, as for example the offence of kidnapping a person from British India or a minor from lawful guardianship, of committing rape, or the committing of a public nuisance.

In such cases a drunkard could not excuse himself by pleading that he did not know or intend to do the act, for the Code declares the mere commission of the act to be an offence.

In the second class of cases the Code requires an act to be done knowingly or voluntarily in order to be an offence without specifying any particular knowledge as requisite : for example to cause hurt is not an offence, unless it is caused voluntarily, sections 319, 321.

A man is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, or by means which at the time of employing those means he knew or had reason to believe to be likely to cause it.

In my opinion this vague unspecified knowledge follows from acknowledge of the nature of the act. The agent cannot know the one without knowing the other ; as Mr. Mayne says "A man is properly said to be ignorant of the nature of his act when he is ignorant of the properties and operation of the external agencies which he brings into play" (paragraph 185 of his work on Criminal law).

In such cases also therefore ignorance due to voluntary drunkenness is I think no excuse in law.

In each of these cases however the result will be different and the drunkard will be excused if he can show that his habits have produced a fixed or even an intermittent state of unsoundness of mind of the requisite character, as for example if a drunkard

1921.

TUN BAW v. KING-EMPEROR.

commits an offence in a state of delirium tremens. In such a case section 84 will apply as stated by Mr. Mayne in paragraph 200 of his work.

A third class of cases arises when an act to be an offence has to be committed intentionally and the intention is not specified as for example in sections 224, 225, 228 of the Code.

In most cases intention has to be inferred from the nature of the acts done and from all the circumstances of the case and in my opinion if a drunkard by reason of his drunkenness does not know the nature of his act, he cannot be presumed to have intended the consequences of that act and therefore in cases when an act is not an offence at all unless it is done intentionally, drunkenness in my opinion is an excuse.

It must of course be remembered that by reason of section 105 of the Evidence Act the drunkard will be presumed to know the nature of his act and the onus of proving that he did not will lie upon him.

There are also many acts in the Penal Code which are declared not to be offences unless done with a particular intention or knowledge. To these section 86 applies. I agree with the learned Chief Judge whose judgment I have had the advantage of perusing that the word particular in this section is synonymous with specified. These acts are divided into two classes, the first consisting of those acts in which a specified knowledge on the part of the agent is sufficient to constitute the act an offence, as for example in cases of adultery, defamation, culpable homicide and even murder if the circumstances are such as to bring the act within the 4th clause of section 300, while the second class consists of those acts in which a specified intention on the part of the agent is requisite to cause them to be offences, as for example in cases of murder which do not fall within the clause abovementioned and in all cases in which the definition contains the words dishonestly, fraudulently and the like as in theft, robbery, forgery. In all these cases the intention must be proved. In the case of a man who is not drunk, the proof of intention is almost invariably a matter of inference, and when the result of a man's acts is the natural or necessary consequence of those acts, an intention to have produced those consequences is almost irresistibly inferred from his having done them with the knowledge that those consequences were the natural or necessary results of his acts.

The justification for drawing the inference weakens in proportion as the result produced is the probable, likely, unlikely or improbable consequence.

Section 86 is two-fold : it deals both with acts which are offences if done with a specified knowledge only or if done with a specified knowledge or with a specified intent and secondly with acts which are offences only if done with a specified intent.

Its provisions however are the same with regard to both classes and it enacts that the voluntary drunkard is to be dealt with as if he had the same knowledge as he would have had if he

had not been intoxicated. This means in my opinion that the voluntary drunkard must in the first instance prove to the Court that owing to his intoxication he had not the same knowledge in relation to the offence, as he would have had if sober. The onus of proving this will be upon him and the contrary will be presumed, *vide* section 105 of the Evidence Act.

If he fails to prove this and it is hardly necessary to say that a drunkard is often fully conscious of what he is doing and what are the natural consequences of his acts, then section 86 will not apply at all and an intention to have produced those consequences will be presumed or not just as it would be in the case of a sober man.

If however he succeeds in satisfying the Court that as a fact and owing to his drunkenness he had not the same knowledge as he would have had if sober, then the section provides that he is to be dealt with as if he had the same knowledge, and if his knowledge when sober would have included the particular knowledge required to constitute an act an offence, he is liable to be dealt with accordingly and convicted. Therefore a drunkard may always be convicted for acts which only require a particular knowledge, in order to be offences assuming he would have had that knowledge when sober. He may therefore always subject to this assumption be convicted for such offences as culpable homicide, the causing of hurt to a man, or harm to his property, or defamation. But the section does not say that such a man is to be dealt with as though he had the same knowledge and intention as he would have had if sober. The term "intent" is carefully omitted in the second part of the section though present in the first part, and the whole wording is I think studiously chosen. Knowledge on the part of the drunkard is not to be presumed. He is only to be dealt with in the same way as if he had had that knowledge. From actual knowledge it is possible to presume intent. From a knowledge that had by law to be presumed, it might have been argued that intention must also be presumed in law. The Legislature was therefore careful not to say that a voluntary drunkard should be presumed to have the same knowledge as he would have when sober, but stated that he should be dealt with as if he had that knowledge which exhypothesis he did not have : and lastly as it intended that drunkenness should be an excuse for certain offences, it used the indeterminate term "shall be liable to be dealt with." In cases therefore when a specified intention is an essential ingredient of the offence as for example in all cases of theft, robbery, dacoity and wherever an act in order to be an offence must be done dishonestly as defined in the Code, drunkenness is an excuse in my opinion, provided the drunkard proves that he had not as a fact the knowledge which would enable the requisite intention to be inferred.

There are also acts which are already offences but which become more heinous if done with a specified intent or knowledge.

1912.

TUN BAW
v.
KING-EMPEROR.

In these cases the same principles will apply : if the intent is essential to constitute the offence the drunkard cannot be convicted of the more heinous offence, though he may be convicted of the less aggravated offence, if intention was not essential to such offence as for example a drunkard who can rebut the presumption of intention cannot be convicted of kidnapping a child under ten with the intention of robbery, but he may be convicted of kidnapping if the child was under lawful guardianship. Lastly in offences where voluntary drunkenness is an excuse it will often be found that the offence is composite or resultant in other offences for which he may be convicted. Thus if in committing robbery he inflicts or attempts to inflict hurt, or if in committing house-breaking he damages person or property, though he cannot if he brings himself within section 86 be convicted of robbery or house breaking, he may be punished for the hurt he inflicts or attempts to inflict or for the damage he causes to property or again if he thieves when drunk and retains when sober it is quite possible that he could be found guilty of criminal misappropriation.

In the case under consideration the accused has been convicted of an attempt at robbery armed with a deadly weapon. As either theft or extortion is an essential ingredient in robbery and as each requires intention on the part of the agent as an essential factor to constitute the offence, it follows that in my opinion the accused could not, if he had succeeded in his attempt, have been convicted of robbery provided that he satisfied the Court that owing to his intoxication his actual knowledge of what he was doing was not such as to justify the presumption that he intended to cause wrongful gain to himself. If he could not have been convicted of the consummated act, he could not in my opinion have been convicted of the attempt. But on the facts which are set out in the judgment of the learned Chief Judge I am clearly of opinion that as a fact he knew quite well what he was doing and did as a fact intend to cause wrongful gain to himself. His appeal therefore to section 86 in my opinion fails. I also agree that taking all the circumstances into consideration it is possible to consider the case to have been an attempt at extortion rather than at robbery and in the order and sentence proposed.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

Civil Miscellaneous Appeal No. 145 of 1911.

MA MYA *v.* FELIX SLYM.

May 23rd, 1912.

May Aung—for appellant (respondent).

P. N. Chari—for respondent (petitioner).

Illegitimate children—rule as to custody—mother generally proper custodian.

In dealing with the custody of the illegitimate children of parents in this country whose personal law is obscure, the rule that the desire of the mother of such a child as to its custody is primarily to be considered, should be adopted.

1912.

MA MYA
v.
FELIX SLYM.

Barnardo v. *McHugh*, (1891) L.R. App. Cases, 388, referred to.

Fox, C.J.—The District Judge overlooked or did not appreciate the fact that the children are not legitimate. It is unnecessary to decide whether the girl is an European British Subject and the boy is not such under the definition in the Guardian and Wards Act. Under English law an illegitimate child is regarded as nobody's child, and neither the father nor the mother has any absolute right to the custody of their illegitimate child—see Trevelyon on Minors, page 77.

In dealing with the custody of illegitimate children the Courts in England are governed by equitable rules and exercise equitable jurisdiction. One of those rules is that the desire of the mother of an illegitimate child as to its custody is primarily to be considered—see *Barnardo* v. *McHugh* (1).

This equitable rule should I think be adopted in the case of parties in this country whose personal law is obscure.

There is nothing against the present character of the mother, whereas the father is stated to be again living in adultery.

The suggestion that the mother is not quite compos mentis appears to have little foundation. I would allow the appeal, reverse the order of the District Court and dismiss the father's petition to be appointed guardian of the children with costs to be paid by him.

I would also order that he pay the respondent's costs of this appeal—three gold mohurs allowed as advocate's fee.

Hartnoll, J.—I concur.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

Civil Revision No. 125, of 1911.

May 13th, 1912.

1. NASSIAH
2. VERIAH
3. SUBIAH

v.

1. VYTHALINGAM THINGANDAR.
2. PAKIRI AMMAL.
3. RANGAMA.
4. HENRY BICTJAR.
5. RAMANATHAN REDDIAR.

N. N. Burjorjee—for applicants.

Villa and *J. R. Das*—for respondents.

Application to sue in forma pauperis—*rejection by Court—compulsory nature of provisions of law—Rules 2, 3, and 5, Order XXXIII, Civil Procedure Code, 1908.*

Under Rule 5 of Order XXXIII, Civil Procedure Code, a Court is bound to reject an application which is not framed and presented in accordance with the provisions of Rules 2 and 3 of that Order.

Even if we have the power to interfere with the order in revision, we cannot do so.

(1) (1891) L.R. App. Cases 388.

1912.

NASSIAH v. VYTHALINGAM THINGANDAR.

Rule 5 of Order XXXIII provides that the Court shall *reject* an application for permission to sue as a pauper (*a*) where it is not framed and presented in the manner prescribed by Rules 2 and 3.

This application was not framed in such manner in as much as the verification of the statements in it was not in accordance with the verification prescribed for pleadings.

Rule 5 leaves no option in such a case and the Court is bound to reject a deficient application.

We express no opinion as to whether such rejection precludes or does not preclude a similar application being presented with a correct verification.

This application is dismissed with costs—two gold mohurs.

Civil Miscellaneous Appeal No. 158, of 1911.

June 19th, 1912.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

MA SAW *v.*
1. MA THIT.
2. MAUNG AUNG THA.
3. MAUNG CHEIK.
4. MAUNG PO HLA.
5. MA NYEIN HLA.

Ba Saing—for appellant.
C. Brown—for respondents.

Probate—Letters of Administration—failure to appoint executor under a will—action of legatees—minor—guardian—sections 183, 187, 198, 215; Indian Succession Act, 1865.

If by the will of a deceased person, no one is appointed an executor, it is open to the Court to grant Letters of Administration with the will annexed under section 198 of the Indian Succession Act to one of the persons having a beneficial interest in the estate. Under section 183 of the Act, letters cannot be granted to a minor : nor under section 215 of the Act, to the guardian of a minor when that minor is not the sole residuary legatee.

Fox. C. J.—The testatrix having been a Christian, probate or letters-of-admininistration with the will annexed should be taken out by somebody, otherwise under section 187 of the Indian Succession Act the legatees acquire no title to the property.

In the will four persons are named as the testatrix's heirs, amongst them is Tun Nyun, the son of the applicant. No one is expressly appointed executor. It is open to the Court to grant letters-of-administration with the will annexed under section 198 of the Act to one of the persons having a beneficial interest in the estate, but Tun Nyun being a minor such letters cannot under section 183 be at present granted to him : and as he is not a sole residuary legatee, letters could not be granted to his mother, the applicant in the case, under section 215 of the Act

1912.

MA SAW
v.
MA THIT.

The order of the District Judge dismissing the application was right, but the reasons he gives were not altogether correct. The appeal is dismissed, but at the same time it may be pointed out that in the case of a Christian it is very desirable that one of the adult heirs should apply for letters-of-administration in order that complications as to title to the property should be avoided. In the present case it would appear that some money is payable by Government to the estate. This affords a further reason for the taking out of letters-of-administration.

Hartnoll, J.—I concur.

Privy Council

(On appeal from the Chief Court of Lower Burma.)

Before Lord Macnaghten, Lord Atkinson, Lord Shaw, Sir John Edge, and Mr. Ameer Ali.

1. MOOSA GOOLAM ARIFF.
2. HOOSAIN GOOLAM ARIFF
3. SALAY GOOLAM ARIFF
4. RASOOL BI BI

} Minor children of Goolam Ariff by their guardian *ad-litem* Saiboo Bi Bi.

5.(*a*) MOOSA GOOLAM ARIFF
(*b*) HOOSAIN GOOLAM ARIFF.
(*c*) SAIBOO BI BI

} Legal representatives of Hafiz Bee, deceased.

6. SAIBOO BI BI
7. MARIAM BI BI
8. AHMED CASSIM PATAIL
9. EBRAM CASSIM PATAIL
10. DAWOODJEE MAHOMED MASHA.
11. MAHOMED CASSIM PATAIL
12. ISMAIL CASSIM PATAIL
13. MAHOMED EBRAHIM MUNEE
14. SALAY CASSIM PATAIL
15. MAHOMED HASSIM PATAIL
16. THE GOOLAM ARIFF ESTATE COMPANY

v.

1. EBRAHIM GOOLAM ARIFF.
2. P. C. SEN, OFFICIAL RECEIVER.

Company Law—registration of companies—Certificate of incorporation conclusive—Subsequent enquiry as to compliance by the Registrar of Companies with conditions of incorporation precluded—Res judicata—*Sections 6 and 41, Indian Companies Act, 1882—Section 13, Explanation II, Civil Procedure Code, 1882.*

The validity of certain conveyances made by a Mahomedan were established in a suit; but the validity of the incorporation of a Company, registered subsequent to the making of the conveyances but prior to the filling of that suit was left undetermined. In a suit brought later to determine this point, the two main issues were

1912.

MOOSA GOOLAM ARIFF v. EBRAHIM GOOLAM ARIFF.

(a) Is the certificate of incorporation of a Company conclusive that all previous requisitions have been complied with and does it preclude any enquiry as to the regularity of the prior proceedings?

(b) Was this question raised by the suit "res judicata"?

On the first issue it was held that once the certificate is given the validity of the incorporation of a company cannot be questioned on the ground that the conditions of registration (*e.g.*, the requirement that there must be seven subscribers to the memorandum of association) prescribed by the Companies Act were not duly complied with.

On the second issue it was held that as all the facts on which the latter suit was based were known to the plaintiff and were stated at length in the proceedings in the previous suit, as no further evidence would have been needed and as nothing was wanting save the addition of an issue the point ought to have been raised in the earlier suit and the later suit was therefore barred by section 13, Civil Procedure Code, 1882.

Peel's Case, 2 Ch. A.C., 674; *Oakes* v. *Turquand*, L.R., 2 English and Irish Appeals, 325; *Kameswar Pershad* v. *Rajkumari Ruttun Kœr*, 19 Indian Appeal, 234; followed. *In re National Debenture and Assets Corporation*, (1891) 2 Ch., 505, *referred to*.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side.

The judgment of their Lordships of the Privy Council was delivered on the 26th June 1912 by—

June 26th, 1912.

Lord Macnaghten.—The Record in this case is more than co-ordinarily confused and the story is somewhat complicated. But for the purpose of this Appeal the material facts may be stated in a few sentences.

One, Hadjee Goolam Ariff, a wealthy Mahomedan merchant residing at Rangoon, being dissatisfied with the conduct of his two elder sons, was minded to dispose of the bulk of his property for the benefit of his two junior wives and his five younger children, who were all minors at the time. With this object he applied for and obtained five separate orders under the Act of 1890 for the appointment of one and the same person as guardian of each of his minor children in order that the children by their guardian might accept the benefits which he intended to confer upon them. Being also desirous that his property should remain in one mass, intact and undistributed, he procured the registration of a limited Company called the Goolam Ariff Estate Company, Limited. To this Company in return for shares there was transferred so much of his property as was retained by him together with the undivided shares in his estate which he had conveyed to his junior wives and his minor children.

Hadjee Goolam Ariff died on the 15th of May 1902, having made his will on the 19th of the previous month. It was proved by his eldest son, Ebrahim Goolam Ariff, one of the executors therein named on the 23rd of June 1902. From that time to the present there has been continuous and persistant litigation in which Ebrahim Goolam Ariff has endeavoured to set aside the disposition which his father made. In all these attempts Ebrahim Goolam Ariff failed except in his appeal in the present suit to the Chief Court of Lower Burma. On that appeal the order was made from which the present appeal to His Majesty has been brought.

1912.

MOOSA GOOLAM ARIFF v. EBRAHIM GOOLAM ARIFF.

The object of the present suit was to have it declared that the Goolam Ariff Estate Company, Limited, was not duly incorporated, and that the property conveyed to the Company should be transferred "to the persons entitled to the same." The validity of the conveyances to the testator's junior wives and his minor children had been established in a suit No. 146 of 1902, which ultimately came before this Board. But the validity of the incorporation of the Company had not been expressly determined.

The main grounds of defence to the present suit were—

(1) that the certificate of incorporation of the Company was conclusive; and

(2) that the question raised by the suit was "*res judicata.*"

The question framed to meet these points were both answered by the Court of Appeal in favour of the Plaintiffs. In their Lordships' opinion both ought to have been answered in favour of the Defendants, who are the present Appellants.

In dealing with the first question their Lordships will assume that the conditions of registration prescribed by the Indian Companies Act were not duly complied with, that there were not seven subscribers to the memorandum of association, and that the Registrar of Companies ought not to have granted a certificate of incorporation. As a matter of fact a certificate of incorporation was granted. In their Lordships opinion the certificate of incorporation is conclusive for all purposes.

The provisions of the Indian Companies Act of 1882 as regards the incorporation of companies are the same as those contained in the Imperial Act of 1862, except that it is specially provided in section 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subcribers to the memorandum are competent to contract. Probably this provision was introduced because according to the Indian law the contract of an infant is not voidable but void, and it would lead to endless confusion and expense if the Registrar were to take upon himself the duty of ascertaining whether the signatories to the memorandum were or were not of full age.

In England the question whether the Registrar's certificate is conclusive was decided so far back as 1867 by Lord Cairns sitting in the Court of Appeal. In Peel's case 2, Ch. 674 (1) after signature and before registration a proposed memorandum of association had been altered without the authority of the subscribers so materially that in the words of Lord Cairns, "the alteration entirely neutralised and annihilated the original execution and signature of the document. The Company, however, was registered and the Registrar gave his certificate of incorporation It was objected that the memorandum of association had not been signed by seven or indeed by any subscribers and that the provisions of the Act had not been complied

(1) 2, Ch. A.C., 674.

1912.

MOOSA GOOLAM ARIFF v. EBRAHIM GOOLAM ARIFF.

with. To that proposition Lord Cairns assented. But "the certificate of incorporation," he said "is not merely *prima facie* answer but a conclusive answer to such objection. When once the certificate of incorporation is given nothing is to be enquired into as to the regularity of the prior proceedings." That was a plain and direct decision on the point. The observations of Lord Chelmsford in *Oakes* v. *Turquand*, L.R. 2, E. and I. Appeals, 325 (2) are to the same effect. I think" said his Lordship, "that the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in the case that all previous requisites had been complied with." Undoubtedly Lord Cairns' decision has been cavilled at. For instance *In Re National Debenture Corporation*, 1891, 2 Chancery, 505 (3), a Judge as first instance declined to treat a certificate of incorporation as conclusive which had been as was supposed subscribed by six persons only. On appeal, however, further evidence was admitted and it was found that the memorandum had in fact been subscribed by seven persons. On that ground the Court of Appeal reversed the decision appealed from. But unfortunately the learned Judges of Appeal made some observations to the effect that if the learned Judge had been right as to the facts his decision in point of law would have been correct. These observations were mere dicta and besides the Court of Appeal could have had no jurisdiction to reverse Lord Cairns' decision. In their Lordships' opinion that decision is of unquestionable authority untouched by any subsequent decision and unimpaired by any dictum in any Superior Court, although the Legislature thought fit no doubt for good reasons to set the matter at rest by the Imperial Act of 1900, which put the words of Lord Cairns and Lord Chelmsford in a legislative enactment repeated in the Imperial Act of 1908.

Their Lordships are prepared to go further and to say that in their opinion, even if there were no authority to guide their decision, the matter would seem to them to be absolutely plain on the words of the Act. The use of the word "otherwise" in section 6 shows that the statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration, and apparently essential.

This view is sufficient to determine the case in favour of the Appellants, but inasmuch as the question of *res judicata* was very fully argued their Lordships do not think it right to abstain from dealing with it.

Section 13 of the Code of Civil Procedure of 1882 enacts that:—

"No Court shall try any suit or issue in which the matter directly or "substantially in issue has been directly and substantially in issue in a former

(2) L.R. 2 English and Irish Appeals, 325.
(3) (1891) 2 Ch., 505.

1912.

MOOSA GOOLAM ARIFF *v.* EBRAHIM GOOLAM ARIFF.

"suit between the same parties or between parties under whom they or any "of them claim litigating under the same title in a Court of jurisdiction com- "petent to try such subsequent suit or the suit in which such issue has been "subsequently raised and has been heard and finally decided by such "Court."

Then Explanation 2 of that section declares that :—

"Any matter which might and ought to have been made ground of "defence or attack in such former suit shall be deemed to have been a matter "directly and substantially in issue in such suit."

It was admitted by the learned Counsel for the Respondents that the alleged invalidity of the incorporation of the Goolam Ariff Estate Company, Limited, might have been made a ground of attack in the suit No. 146 of 1902, in which the validity of the dispositions made by Hadjee Goolam Ariff was attacked.

That it ought to have been made a ground of attack in that suit appears to their Lordships to be equally clear. All the facts on which the present suit is based were known to the Plaintiff and are stated at length in the proceedings of the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point. The case is plainly within the ruling of this Board in the case of *Kameswar Pershad v. Rajkumari Ruttun Kœr* (4).

Their Lordships therefore think that the question raised in the present suit is *res judicata*, and on that ground as well, as on the ground that the certificate of incorporation is conclusive, their Lordships think that the suit fails and ought to be dismissed.

Their Lordships are therefore of opinion that the appeal ought to be allowed and the suit dismissed with costs both here and below, and their Lordships will humbly advise His Majesty accordingly.

Before Mr. Justice Robinson.

Civil Regular No. 91 of 1912.

(Original Civil Jurisdiction.)

July 16th 1912.

HING NAM HIP KEE *v.* THE BATAVIA SEA AND FIRE INSURANCE CO.

V. T. N. Sivaya—for plaintiff. | *McDonnell*—for defendant

Insurance Law—fire insurance—conditions of issue of policy—failure to comply therewith—penalties consequent thereon.

A insured his hotel with B but failed to notify a subsequent insurance on the same property. He also failed to submit his claim for damages done by fire within a month from the date of the occurrence. Two of the conditions upon which the policy issued were :—

(*a*) That failure to notify assurances made with other companies resulted in a forfeiture of the right of recovery ; and (*b*) that notice of loss or damage by fire had to be given to the Company within one month.

(4) 19 I.A., 234.

1912.

HING NAM HIP KEE v. THE BATAVIA SEA AND FIRE INSURANCE COMPANY.

Held,—that both were conditions for which B had a right to stipulate and precedent to the attaching of any liability on B.

The fact that A was in prison and could not give the notice required by the policy to B did not excuse him.

Sulphite Pulp Company v. *Faber*, XI Times Law Reports, 547; *Roper* v. *London*, 28, L. J. R., Q. B., 260; referred to.

Plaintiff insured the furniture and fittings in his hotel with the defendant Company for Rs. 5,000 on the 3rd January 1910 and the policy was renewed on the 3rd January 1911. A fire occurred on the 18th November and plaintiff claims Rs. 5,000 under the policy.

Defendant raised two legal objections based on the conditions noted on the back of the policy, and as none of the facts necessary for the consideration of these legal objections are in dispute I framed two preliminary issues. The objections are based on conditions 5 and 8. The policy is issued subject to the conditions printed at the back and the notice of the assured is specially drawn to these conditions by a note in large type at the foot of the policy. The conditions runs as follows:—5. Assurances made with other Companies on property assured by this Company must be noticed either in, or by endorsement upon the policies granted by this Company. Persons neglecting to notify such assurances with other Companies, will forfeit their right of recovery on this Company. 8. If any loss or damage by fire be sustained on property assured with this Company, the person assured is forthwith to give notice of such loss or damage at the Company's office; and as soon as possible after, and within one month at the utmost, to deliver into the Company as exact an account of the particulars and amount of such loss or damage as the nature of the case may admit.

It is not denied that subsequent to taking out this policy the plaintiff insured the same furniture and fittings for a sum of Rs. 10,000 with the Scottish National Fire Insurance Company shortly before the fire occurred. The only argument that Mr. Sivaya was able to put forward for the plaintiff as regards condition 5 was that that condition related only to insurance already effected prior to the insurance in the suit and not to those taken out subsequently. I am unable to see that the clause can be limited in this way. It relates to insurances made with other Companies and the argument appears to rest entirely on the fact that the expression "must be noticed in" is used, but the expression is not merely "noticed in" but "by endorsement upon." Mr. Porter in his Laws of Insurance, 3rd addition, page 188, points out "The importance of being informed of the names of the offices which are jointly interested in a risk is obvious to all who have any acquaintance with the law and practice of insurance, and nothing therefore can be more reasonable than that the persons assuring should stipulate for information being given as to the offices in which other insurances are existing or are sub-

sequently taken out; and it is competent for them to stipulate that if any erroneous or untrue representation be made on this point the policy shall be void, and if they do so, the Courts cannot hold any part of the representation immaterial. Breach of a condition that other insurance shall be notified to the granter of a particular policy and notice thereof endorsed on the policy or otherwise recognised by the granter, is, unless waived, absolutely fatal to any claim on the policy." The necessity for insisting on information as to both prior and subsequent insurances is perfectly clear and has already been recognised. The condition was clearly intended by the parties to be a condition precedent to the attaching of any liability: for the condition itself lays down that if it be not complied with the assured will forfeit his right of recovery. That a fire insurance company has the right to stipulate for such conditions cannot be contested and it seems hardly necessary to quote authority. I will however quote from the judgment of Lord Russel of Killowen, C J., in the case of the *Sulphite Pulp Company* v. *Faber* (1). The conditions were the same as the condition I have to consider, but also provided that should any insurance cease that fact must be notified by the insured to the Company. The learned Judge says "Next, as to clause 5 of the North British Policy. The essential part was that the Company was to have notice if any insurance previously effected ceased. He took that to be any risk effected before the policy in question. It was quite clear that that part of the clause had not been complied with. Not only the North British risk but further risks ceased without notice to the defendants. For what followed from that they had to look to clause 6 in the North British Company's policy. If notification had been given the insurer had the option to cancel the policy, in which case the assured would get back the unearned portion of the premium. In his Judgment it was a clear condition on failure to comply with which liability ceased, and the policy came to an end." "It was a condition which went to the root and substance of the contract which had been broken; and the Plaintiffs could not recover". The principle is exactly the same in the present case. There are many other decisions also holding that such a condition as this is a condition precedent and that breach of it prevents the assured from recovering anything from the Company.

As to condition 8 it is admitted that notice was not given and that no account was admitted of the loss suffered within one month. But it is urged that the morning following the fire plaintiff was arrested by the Police on a charge of arson and that he was detained in prison and it was impossible therefore for him to have either given the notice forthwith or to have submitted the account within the time limited. As to whether notice is a condition precedent in such a contract as this that must be judged by the intentions of the parties as appearing in the document.

(1) XI Times Law Reports, 547.

1912.

HING NAM HIP KEE v. THE BATAVIA SEA AND FIRE INSURANCE COMPANY.

It has been held to be a condition precedent and doubts have also been expressed as to whether it is a condition precedent, but I don't propose to go into them as Mr. McDonnell did not press that point in his objection based on condition 8. He relies on the fact that an account was not submitted within one month. However, even admitting that it was impossible for plaintiff to have submitted the account within one month, the question remains whether that is any adequate reply to the objection raised. Mr. Porter in his work lays down that the contractual limitation will not be extended on the ground that the assured was in prison at the time of the loss and so continued until his death, and bases this on an American judgment which I have been unable to consult. It is clear, however, that condition 8 is intended by the parties to be a condition precedent to the attaching of any liability on the Company. The condition is again a condition which it is obviously right and proper for the Company to demand and that they should be informed of the exact amount of loss claimed at the earliest possible time after the fire, is obviously necessary. The fact that plaintiff was unable under circumstances, which he could not control, to make the report in time does not excuse him. In Welford and Otter Barry's Fire Insurance at page 251 it is pointed out in respect of notice that where it is a condition precedent if the claimant fails to give notice he will be precluded from enforcing the policy, even though circumstances beyond his control have rendered it impossible for him to give the notice within the prescribed time, and it has, in fact, been given at the earliest possible opportunity. Cases are there quoted in which the claimant did not give the notice because he did not become aware that he has sustained any injury until after the time limited for giving notice had expired. Again, where owing to the sudden character of the accident and its resulting in instantaneous death, there was nobody capable of giving the requisite notice, it was held that the Company, was not liable. It appears to me the principle underlying the giving of notice and the submitting of account is exactly the same. In *Roper* v. *Lendon*, (2) there was a condition that notice should be given forthwith and that an account should be given within fifteen days. The clause is worded exactly as the present clause is worded in this respect. Lord Campbell, C.J., said "Mr. Jones very properly admitted that the delivery of particulars is a condition precedent to the plaintiff's right to recover; and that being so, the whole of the condition expressed in the policy must be precedent to the plaintiff's right to recover. The delivery must be within fifteen days after the fire, and it is very reasonable that it should be so; it being of the utmost importance to the Company to know, as soon after the loss as possible, the exact amount for which the plaintiff claims compensation." Mr. Justice Hill said, "The plaintiff not having delivered within

(2) 28 L. J. R., Q. B., 260.

1912.

HING NAM HIP KEE v. THE BATAVIA SEA AND FIRE INSURANCE COMPANY.

fifteen days after the fire the particulars of his claim, has disentitled himself from making that claim against the office." I am therefore of opinion that both condition 5 and condition 8 were conditions precedent to the attaching of any liability and that plaintiff having failed to fulfil the requirements of these two conditions his suit fails. The suit is dismissed with costs.

Before Mr. Justice Hartnoll.

NAN SAW SHWE *v.* MAUNG HPONE.

Criminal Revision No. 179B of 1912.

August 1st, 1912.

Maintenance—decree for restitution of conjugal rights without an order for guardianship of child—payment of amount ordered for maintenance of child to be enforced—section 488, Code of Criminal Procedure, 1898.

A obtained an order of maintenance for her child against B. Later B secured a decree against A for restitution of conjugal rights. This decree did not include any order to the effect that the guardianship of the child should be given to B. *Held*,—that as long as the child remained with the mother, the statutory obligation to subscribe towards its maintenance remained binding on B. The proviso to sub-section 3 and sub-section 4 of section 488, Code of Criminal Procedure, 1898, apparently refer only to cases in which an order is passed for the maintenance of a wife and not of the children.

In re Bulakidas, I.L.R. 23 Bom., 485; *Lutpoze Deomony* v. *Tikha Moodoi*, 13 W. R. Cr., 52; *Sur Muhammad* v. *Ayesha Bibi*, I.L.R. 27 All., 483; *San Hla* v. *On Bwin*, 2 L.B.R., 46; referred to.

Nan Saw Shwe obtained an order under section 488 of the Criminal Procedure Code on the 6th September 1911 from the Subdivisional Magistrate, Kawkareik, that Maung Hpone pay her Rs. 3 per month for the maintenance of their child. On the 4th October 1911 Maung Hpone brought a suit against Nan Saw Shwe in the Township Court of Kawkareik for restitution of conjugal rights and obtained a decree for such on the 15th January 1912. On the 11th May 1912 Nan Saw Shwe applied to recover Rs 18 arrears of maintenance due to her. This application was to the Subdivisional Magistrate who passed the order. Maung Hpone contends that he is not liable to pay any arrears as sometime after the maintenance order was passed against him he obtained a decree for restitution of conjugal rights and so he is not liable. He quotes the case of *In re Bulakidas* (1) as authority for his contention. When the Subdivisional Magistrate heard Nan Saw Shwe's application on the 23rd May 1912 that latter told him that though she was aware of the decree she did not wish to live with Maung Hpone, giving as the sole reason that once he tried to get rid of her and now she will not go back even though he wanted her. The Magistrate then passed an order granting her a sum of Rs. 19-8-0 as arrears of maintenance and costs.

(1) (1898) I.L.R. 23 Bom., 485.

1912.

NAN SAW SHWE v. MAUNG HPONE.

His attention was subsequently drawn to the case of *Lutpotee Doomony* v. *Tikha Moodoi* (2), and not being satisfied with the correctness of his order of the 23rd May he referred the case to the District Magistrate to take it up on revision and stayed the execution of his order. The District Magistrate has submitted the case to this Court recommending that the order of the Sub-divisional Magistrate of the 23rd May be modified by an order for payment of Rs. 3-14-0 as maintenance allowance due as arrears from the 6th December 1911 to the 15th January 1912 the date of the decree.

It must be remembered that the maintenance order for Rs 3 per mensem was granted as maintenance for the child of the parties and not to the wife as her own maintenance. In the case of *Lutpotee Doomony* v. *Tikha Moodoi* (2) the maintenance order was one for the maintenance of both wife and children. The husband Tikha Moodoi instituted a suit in the Civil Court for restitution of conjugal rights and for guardianship of his children and obtained a decree for such. The Deputy Commissioner on the criminal side refused to release him from the obligation to pay maintenance when he petitioned to be released from such obligation on a date subsequent to his obtaining his decree in the Civil Court, and further subsequently, after he had obtained possession of one of his sons in execution proceedings taken under the decree he had obtained, ordered the return of the child to its mother. The Judicial Commissioner in referring the case to the High Court to set aside the orders of the Deputy Commissioner, and to direct that the maintenance order should determine from the date of the decree of the Civil Court gave as the grounds that the Deputy Commissioner sitting as a Magistrate, acted illegally in passing orders opposed to the decision and process of the Civil Court, and, further, as the ground, upon which the applicant Tikha Moodoi petitioned the Deputy Commissioner as Magistrate to be relieved from payment of maintenance as his wife, persisted in her refusal to live with him, appeared resonable. The High Court set aside both orders of the Deputy Commissioner acting as a Magistrate. The case "*In re Bulakidas*" (1) followed the decision in the Calcutta case, but it dealt only with an order that the wife obtained for maintenance for herself. There is yet another case of the Allahabad High Court in which the same principle was followed as in the two above mentioned cases—that of *Nur Muhammed* v. *Ayesha Bibi* (3) but that case again only referred to a case where a wife had obtained an order of maintenance for herself. In the present case the order for maintenance was not one made for the maintenance of the wife but was for the maintenance of the child, and so the circumstances are different to those in the Bombay and Allahabad cases quoted. In the Calcutta case the maintenance order was for the wife and children, but the father obtained a decree for restitution of conjugal

(2) 13 W. R. Cr., 52.
(3) (1905) I.L.R., 27 All., 483.

1912.

NAN SAW SHWE v. MAUNG HPONE.

rights and for guardianship of the children. In the present case there was no decree that the father should have the guardianship of his child, and in my opinion as long as it remains with the mother the statutory obligation on him to maintain it remains still binding on him. That he neglected to maintain it is clear as in the proceedings taken by Nan Saw Shwe under section 488 he even denied paternity. The proviso to sub-section *3* and sub-section (*4*) of section 488 of the Criminal Procedure Code would seem to refer to cases where a wife obtains a maintenance order for herself and not where one is made for the children. The meaning of the proviso to sub-section *3* was discussed in the Full Bench case of this Court, *San Hla* v. *On Bwin* (4), in which it was held that it was extremely doubtful whether it applied at all to the case of children. As therefore Maung Hpone has obtained no decree from a Civil Court for the guardianship of his child and as it is living apart from him in the custody of its mother I see no reason for interfering with the order of the Subdivisional Magistrate passed on the 28th May last. It will therefore be enforced.

Full Bench.

Before Sir Charles Fox, Chief Judge, Mr. Justice Hartnoll, Mr. Justice Robinson, Mr. Justice Parlett and Mr. Justice Young.

Criminal Revision No. 505A of 1912.

August 12th 1912.

KING-EMPEROR v. CHANNING ARNOLD.

Rutledge, Government Advocate—for King-Emperor.

Hanlyn – for respondent.

Commitment to a Court of Session—Procedure to conform with the provisions in Chapter XVIII, Code of Criminal Procedure, 1898—section 347 not to be read as if provisions in Chapter XVIII non-existent—Chapter XVIII, sections 346, 347, 348 and 349, Code of Criminal Procedure, 1898.

A Magistrate in holding an enquiry preparatory to commitment was of opinion from the first that the case was one that should be tried by the Sessions Court.

After the first witness for the prosecution was examined and cross-examined the case was adjourned in order to permit of the attendance of another prosecution witness. On the date fixed for further hearing the Magistrate intimated that he intended to examine the accused, frame a charge against him, and direct that the accused be committed to stand his trial at Sessions without allowing the accused, as desired by him, to continue the cross-examination of the first witness. The Magistrate professed to be acting under section 347, Code of Criminal Procedure, 1898.

A Full Bench (Robinson, J., dissenting) held in revision of the case that section 347 does not override the provisions contained in Chapter XVIII of Code but that the words "shall stop further proceedings and commit under the provisions hereinbefore contained" in the former section must be read with reference to these provisions. Mere commitment is effected by making a committal order under section 213 of the Code: and the word "commit" in section 347 must not be read as if it meant only to frame a committal order. The Magistrate must make his proceedings conform with the provisions of Chapter XVIII of the Code and before he writes and signs a committal order must carry out the provisions of that Chapter which

(4) 2 L.B.R., 46.

1912.

KING-EMPEROR. v. CHANNING ARNOLD.

specially provides for procedure antecedent to a trial by a Sessions or High Court.

The commitment was held to be illegal and was quashed under section 215 Code of Criminal Procedure.

In re Clive Durant, (1898), Ratanlal's Unreported Cases, 975 ; *Phanindra Nath Mitra* v. *Emperor*, (1908) I.L.R. 36 Cal., 48 ; referred to.

Fox, C.J.—This case is being considered by a Full Bench in order that it may be finally decided so far as the Courts subordinate to this Court are concerned, whether a novel procedure in committing an accused for trial is legal or illegal.

The accused in the case is charged with defamation punishable under section 500 of the Indian Penal Code.

In his reasons for committial the Magistrate says that it was evident to him from the first that the case was so serious that it should be tried at the Sessions of this Court rather than by himself under section 451 of the Code, and he also says he expressed his opinion in open Court at the first hearing of the case before him.

From this there can be no doubt that his proceedings from the first constituted an enquiry into a case which in the opinion of the Magistrate ought to be tried by the Court of Session or High Court, and consequently the procedure laid down in Chapter XVIII of the Code of Criminal Procedure was *primâ facie* obligatory. Section 207 lays this down in the clearest and most definite terms. Section 208 makes the taking of all such evidence as may be produced for the prosecution or on behalf of the accused, and the giving of the accused an opportunity to cross-examine the witnesses for the prosecution compulsory before a committal order can be made. The Magistrate started to follow the procedure enjoined by the Chapter: the complainant was examined and partially cross-examined on the first day : on the second day the cross-examination was continued but not finished, and the advocate for the accused then suggested that the case should be postponed to enable another witness to attend.

When the case next come on for hearing the Magistrate after apparently intimating what he was about to do, examined the accused, framed a charge against him, and then, according to his view, stopped further proceedings and committed the accused to this Court for trial in accordance with the provisions of section 347 of the Code. He did this because it appeared to him that certain decisions of the Bombay and Calcutta High Courts had construed section 347 in such a way that, thinking as he did that the case ought to be tried at Sessions, it was imperative on him to stop the case before himself and make a committal order. In fact he appears to have considered that he ought to have stopped the case on the first day of hearing provided that the accused had been examined and had admitted publication of the defamatory matter. The accused's advocate and the accused himself protested against the procedure adopted, and before us the accused's advocate reiterated that it was to the accused's prejudice. The sole question we have to consider is whether it

was legal or not, for under section 215, a commitment once made can be quashed only on a point of law.

The only justification for the procedure, if there is justification at all, must be sought for in section 347 of the Code. That section is as follows :

(1) If in any enquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Sessions or High Court, and if he is empowered to commit for trial, he shall stop further procedings and commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial he shall proceed under section 346.

The section is in Chapter 24 of the Code which contains the General provisions as to enquiries or trials. It is one of three sections providing for what a Magistrate should do when in the course of a case he is of opinion that he should not finally deal with a case himself. Section 346 lays down generally what he should do if he considers his powers are insufficient for the case, or that for some other reason the case should go before another Magistrate. Section 349 provides for what he should do when after hearing all the evidence he is of opinion that the accused is guilty, but he considers that the accused should receive a punishment which he cannot inflict, but which some other Magistrate can inflict.

Section 347 is the successor to section 221 of the Criminal Procedure Code of 1872 : that section was in Chapter XVII which contained the provisions regarding the trial of warrant cases by Magistrates. It ran as follows :—

"221. In any trial before a Magistrate, in which it may appear at any stage of the proceedings that from any cause the case is one which the Magistrate is not competent to try, or one which, in the opinion of such Magistrate, ought be tried by the Court of Sessions or High Court, the Magistrate shall stop further proceedings under this Chapter, and shall when he cannot or ought not to make the accused person over to an officer empowered under section 36 (*i.e.*, a Magistrate empowered to award sentences up to seven years' imprisonment), commit the prisoner under the provisions hereinbefore contained. If such Magistrate is not empowered to commit he shall proceed under section 45." This last mentioned section is similar to section 346 of the present Code.

In the general revision and rearrangement of the Code there was no doubt good reason for removing this provision from the Chapter dealing with warrant cases to a chapter dealing with provisions applicable generally to all inquiries and trials before Magistrates. Possibly one reason may have been that according to some decisions in High Courts a trial of a warrant case before a Magistrate did not begin until the accused had been charged and his plea to the charge had been taken, and in order to avoid

1912

KING-EMPEROR v. CHANNING ARNOLD.

all possible question as to the applicability of provisions similar to those of section 221 of the Code of 1872 to any stage of a proceeding before a Magistrate, the Legislature inserted the words "in any inquiry" in section 347 of the Code of 1882, which is re-enacted in the Code of 1898.

The important question is what is the proper construction of the words "he shall stop further proceedings and commit the accused under the provisions hereinbefore contained." *In re Clive Durant* (1), a Magistrate committed a case without taking all the evidence for the prosecution. Two learned Judges of the Bombay High Court rejected an application to quash the order of commitment, and held that the commitment was legal because the section unabled a Magistrate at any stage of the proceedings to stop further proceedings and commit: they made no allusion to the words "under the provisions hereinbefore contained." In *Phanindra Nath Mitra* v. *Emperor* (2), the Magistrate had committed without allowing the accused to cross-examine the witnesses for the prosecution and to call witnesses for the defence; the application to be allowed to cross-examine and to call witnesses for the defence was made after the prosecution had closed its case. Two learned Judges of the Calcutta High Court rejected an application to quash the commitment, holding that that section 347 was not to be read as subject to section 208 of the Code, which lays down that the accused shall be at liberty to cross-examine witnesses for the prosecution and to call witnesses. In this case also no allusion is made to the meaning of the words "according to the provisions hereinbefore contained."

In connection with the case, I will say that if the case had been that the commitment was illegal because the Magistrate had refused to recall the witnesses for the prosecution in order that the accused night cross-examine them after the close of the case for the prosecution, I should fully agree that this afforded no ground for holding that the commitment was illegal, for Chapter XVIII contains no provisions similar to that in section 256 (1) for recalling prosecution witnesses for cross-examination in a case being tried by a Magistrate, and the proper time for cross-examining a witness in any enquiry under Chapter XVIII is in ordinary course immediately after the witness' examination.

I must however entirely dissent from the general construction put upon the section in the two cases quoted. This construction appears to me to overlook the fact that the committal is to be made under the previous provisions—not the previous provision—for committing a case.

Committal to a Sessions or High Court is effected merely by making a Committing order under section 213 of the Code, a section in Chapter XVIII of the Code. That section contains the

(1) (1898) Ratanlal's Unreported Cases, 975.
(2) (1908) I.L.R. 36 Cal., 48.

1912.

KING-EMPEROR v. CHANNING ARNOLD.

sole provision for the mere act of committing an accused for trial. Under the construction put on section 347 in the two judgments alluded to above the Magistrate in the present case would, as he says, have been quite justified in making a committing order on the first day of hearing without allowing cross-examination even to be opened, and in any case a Magistrate would after hearing possibly only the first witness for the prosecution and then being convinced that the case must go to the Sessions or High Court, make a committing order, without even drawing up a charge against the accused. A construction which confines the word "commit" to the mere order of commitment leads to absurdity. It must be conceded that the Magistrate must do something besides writing out and signing such an order : for that something he has to go to the provisions of Chapter XVIII. This being so it appears to me that the meaning of the words "commit the accused under the provisions hereinbefore contained" is that the Magistrate must make his proceedings conform to the provisions of Chapter XVIII, and that before he writes and signs a committal order the provisions of that Chapter which specially provides for procedure antecedent to a trial by a Sessions or High Court must be carried out. The words "stop further proceeding" appear to me to obviously refer to proceedings of a trial or of any inquiry with a view to a trial by himself which he has been engaged on up to the time when it appears to him that the case is one which ought to be tried by the Court of Session or High Court.

It was suggested that section 347 may have been enacted with a view to shortening the proceedings before commitment. It appears to me that the position of the section among sections dealing merely with cases which a Magistrate thinks should not be finally dealt with by himself entirely negatives any idea that the section was enacted by the Legislature with any such object. Even in the Indian Criminal Law Amendment Act, 1908, which is designed for the more speedy trial of certain offences, although the procedure of Chapter XVIII of the Code is very considerably altered for such cases, still the Magistrate is bound before he makes a committal order to record the evidence of all such persons as may be produced in support of the prosecution if it has not already been recorded under Chapter XVIII. But perhaps the strongest reason for holding that section 347 in no way overrides and in no way dispenses with the obligation of following Chapter XVIII is that in that Chapter the Legislature has laid down provisions for procedure before commitment some of which were obviously intended and rightly intended for the benefit of accused persons. I allude to the provision that all the witnesses for the prosecution shall be called, the object of which plainly is that the accused should be made aware of all the evidence that he will have to meet on his trial to the provision for cross-examining the witnesses for the prosecution, and the provision for the accused being able to call

1912.

KING-EMPEROR v. CHANNING ARNOLD.

witnesses before the Magistrate, the object of which provisions is plainly to give the accused a full opportunity of convincing the Magistrate that there are not sufficient grounds for committing him for trial, and thereby putting on him the anxiety and expense of defending himself at a trial, and in a great many cases depriving him of his liberty for a possibly considerable time. A construction of section 347 which places the Legislature in the position of having first enacted elaborate provisions for procedure antecedent to a committing order some of which provisions are manifestly intended for the benefit of accused persons, but later on in the same Act having in a general provision enacted that the previous procedure need not be followed, cannot, in my opinion, be a corret construction.

Possibly the intention of the section might have been expressed in clearer wording, but the wording as it is appears to me to be sufficiently plain, especially if the section is not read at an isolated section, but is taken in connection with the other relevant portions of the Act. In the present case the Magistrate began an inquiry under Chapter XVIII of the Code, being convinced from the first that the case was one which he ought not to try himself, but which he ought to commit to this Court for trial. Section 347 had in my opinion no applicability to the case. In any case however the word "shall" in section 208 is as imperative as the same word in section 347. The Magistrate was bound to take all the evidence which might be produced by the prosecution, to allow the witnesses for the prosecution to be cross-examined by the accused, and to take all such evidence as might be produced on behalf of the accused. He has not carried out these imperative provisions of the law before committing the accused for trial to this Court.

The case comes before this Court in a manner not contemplated by law. I should hold that the commitment was illegal, and I would quash it under section 215, and send the case back to the Magistrate ordering him to continue the inquiry under Chapter XVIII which he commenced, and to proceed with it according to the provisions of that Chapter.

Hartnoll, J.—I entirely concur in the order proposed to be passed by the learned Chief Judge and have little further to say in addition to the reasons which have been given by him.

Section 207 of the Code is : "The following procedure *shall* be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session, or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court." It will be noted that the section distinctly deals with two sorts of cases (1) those triable exclusively by a Court of Session or High Court, and (2) those which in the opinion of the Magistrate ought to be tried by such Court. In the present case the Magistrate from the beginning formed the opinion that the case ought to be committed to this Court. If the accused admitted publication of the article complained of, and so in accordance with the

provisions of section 207 it was obligatory on him to follow the provisions of Chapter XVIII ; but he has construed the provisions of section 347 as rendering it obligatory on him not to do so. This could never have been the intention of the Legislature for, if the views of the Magistrate were followed, there would be no need for the elaborate provisions of Chapter XVIII at all, and also the provisions of Chapter XVIII and of section 347 would be contradictory in their nature. There is no doubt in my mind that section 347 is entirely a supplementary section to Chapter XVIII and refers to a case which the Magistrate at first takes up with a view to disposing of it himself. Before concluding it he finds that it is one which ought to be tried by the Court of Session or High Court—in other words—comes under the category of the second class of case referred to in section 207. Section 347 was enacted to lay down the rule of procedure when such a position arises. It enacts that the proceedings of the Magistrate taken with a view of finally disposing of the case himself shall cease and that he shall deal with the case under the provisions of Chapter XVIII. The position of section 347 supports this view, and it could never have been intended to create an arbitrary power of committal at any stage after the elaborate provisions laid down in Chapter XVIII which are obviously and rightly intended for the benefit of accused persons, and provisions which were intended to give them the opportunity of clearing themselves before the Magistrate of charges made against them and so freeing them from in some cases a period of incarceration and in all from the prolonged anxiety and expense incurred by a trial being ordered, and which were also intended to give them notice of the evidence which will be brought against them on their trials, and also the opportunity of refuting it.

Robinson, J.—The facts are fully stated in the judgment of the learned Chief Judge. The question before as stated generally is whether the provisions of section 347 are subject to those of section 208. The points to be decided in particular are:—(1) whether section 347 applies to all inquiries, (2) what meaning is to be assigned to the words " at any stage of the proceedings," (3) what is the effect of the words " shall stop further proceedings and commit " and (4) to what provisions do the words " under the provisions hereinbefore contained " refer.

That section 347 applies to all inquiries whatsoever is perfectly clear both from the actual words used and from the history of this section. It says " If in *any* inquiry....." Again it was first enacted in the Code of 1872 in practically similar terms but confined to trials. But it found a place in the Chapter dealing with the trial of warrant cases. That section also applied to the cases now governed by section 346. In the Code of 1882 the section was divided into two and was removed to the chapter dealing with general provisions as to inquiries and trials. It was also extended so as to cover not only trials but also inquiries. No change was made when the present Code was enacted.

1912.

KING-EMPEROR v. CHANNING ARNOLD.

The expression "*trial*" has been differently interpreted and an attempt was made to define it but was given up. The reason to my mind was because the word had been held to bear different meanings in different sections, a difference which is shown possibly by the context. However this may be it is clear that the point was present to the mind of the Legislature and therefore the wording of section 347 would be carefully considered. If it had been intended to confine the provisions to cases where Magistrates would primarily try themselves, that is, would start their proceedings under Chapters 20 or 21 this would have been clearly expressed. Instead of this, language of the widest is used and it must I consider be held that the section applies to all inquiries and all trials.

The words "at any stage of the proceedings" are also perfectly clear. No Magistrate could possibly hold that he could commit unless he had some legal evidence before him establishing a *prima facie* case but when he is satisfied of this and that the case ought to be tried by the Court of Session the stage is reached to which this section applies.

The section provides that then he "shall stop further proceedings and commit." It may be said that I should not stop at the word "*commit*," but I do so purposely in order to emphasize the provision. An inquiry under Chapter 18 is with a view to commit from the commencement. This section says that both under that Chapter and under Chapter 20 or 21 the same result is to follow. If any meaning is to be given to these words in the case of inquiries under Chapter 18 it must be that there need not be any further proceeding except for the acts necessary to a committal. If the proceedings began under Chapter 20 or 21 to give them any other meaning is to read into the sections words limiting their meaning to proceedings in primarily summons or warrant cases. There is no justification for any such curtailment.

But it may be said such justification is to be found in words "commit under the provisions hereinbefore contained." The section must be considered together as a whole; no interpretation can be justified which renders other words in the section surplusage. We are here dealing with an inquiry which the Magistrate considered was one under Chapter 18 from the start. If then these words mean that he is to go through the whole procedure laid down in Chapter 18 the direction to him to stop further proceedings is to be treated as non-existent. That direction can only be avoided by reading in words that are not there and this may not be done. I think however that a meaning can be given to the last words of the sub-clause that is reasonable and consistent with what proceeds them and with the clear object and intention of the section. The words "provisions hereinbefore contained" refer back to the word "*commit*" and apply to the provisions for the actual committal as distinct from the taking of evidence, or the examination of the accused. These provisions are those of sections 210, 213, and 218. When the Magistrate is satisfied that there are sufficient grounds for committing the

accused for trial" he must frame a charge. He must then make an order committing the accused for trial and notify the fact of the committal. These are the "provisions hereinbefore contained." This view appears to me to allow of an interpretation which permits of effects being given to all the words of the section without omitting any and without reading in any words and to all cases.

I have already mentioned that in the Code of 1882 the section was separated into two sections. In the Code of 1872 the words "under the provisions hereinbefore contained" applied to Magistrates who were and also to those who were not empowered to commit. The section 347 (2) lays down that the latter are to proceed under section 346. Section 346 requires the Magistrate to stay proceedings and submit the case to another Magistrate who may "commit the accused for trial." Nothing is said here about "provisions hereinbefore contained." If I am wrong in my opinion on section 347 I do not think this is of great moment, but otherwise the omission of these words which previously existed is significant and points to their not being *the* important words of the section.

But though this is my opinion of the strictly legal interpretaton of section 347 I would record my opinion that the discretion given should be most cautiously exercised. There are instances in which the *prima facie* case made out by the prosecution is so strong that the defence evidence could rarely justify a Magistrate in discharging the accused. It is for such cases as these that the section is intended. There are instances when to continue recording evidence down to all the formal evidence would be a mere waste of time. But in exercising his discretion a Magistrate should always remember that the inquiry is meant not only for the establishing of a *primâ facie* case but also to inform the accused fully of the charge and the evidence which he has to meet. He must not lightly take upon himself the duties of the Sessions Court on the one hand but he must not subject the accused to the anxiety and expense of a trial on the other without giving him the opportunity so long as any reasonable possibility exists of showing that he should not be tried. In the present case the accused it is true knows clearly enough the charge and his plea throws the whole onus on him, but he does not know what evidence he has to meet at his trial. The Magistrate did not know what his defence really is nor how strong his proof of innocence may be and I do not think the stage had been reached at which he should have acted under section 347. This however is not a point of law and I do not think the committal can be quashed.

Parlett, J.—I am of opinion that in this case the Magistrate was in reality acting from the outset under Chapter XVIII of the Code of Criminal Procedure, and that section 347 can apply to it only if it be held that that section so completely overrides the provisions of Chapter XVIII as not only to empower but even to

1912.

KING-EMPEROR. v. CHANNING ARNOLD.

require a Magistrate, who is holding an inquiry under that chapter to make an order committing the accused for trial immediately it appears to him that a *primâ facie* case has been made out which should be tried by the Court of Session or the High Court. If this were intended it would have been easy to place the matter beyond doubt by enacting the last sentence of section 347 (1) in some such words as these "he shall stop further proceedings and, notwithstanding anything contained in Chapter XVIII, shall forthwith make an order committing the accused for trial." Moreover, if it were intended that an accused could be committed for trial without the whole of the prosecution evidence being taken, in the same way that a charge can under such circumstances be framed against him in a warrant case, there can be no doubt that section 210 would, like section 254, contain the words "or at any previous stage of the case."

That such is not the intention of section 347 can I think be demonstrated by a consideration of the following section which runs:—

"Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for term of three years or upwards, shall be committed to the Court of Session or High Court, as the case may be, unless the Magistrate before whom the proceedings are pending is of opinion that he can himself pass an adequate sentence if the accused is convicted."

Leaving aside the further reference to section 30 of the Code of Criminal Procedure, this section read by itself and construed literally might be taken not merely to authorize but even to enjoin a Magistrate to make an order committing an accused person for trial merely upon the following materials which would usually be forthcoming without the examination of a single witness—

(*a*) Evidence of accused's previous conviction of one of the offences specified;

(*b*) An accusation against him of having committed one of those offences after such conviction; and

(*c*) The Magistrate's opinion as to the sentence appropriate if the accused is convicted.

Yet it could not be seriously argued that because section 348 contains no specific reference to Chapter XVIII a commitment made under section 348 should not be made strictly in accordance with all the provisions of that chapter. And if a Magistrate taking up a case from the outset under section 348 with a view to a commitment is bound by those provisions, why should he not be equally bound by them because the circumstances which lead him to form the opinion that a case which he originally intended to dispose of himself should be committed for trial, *e.g.*, evidence of previous convictions of any of the

offences specified in section 348, come to light at a later stage of the proceedings? I am unable to suggest any reason that could justify any such apparent anomaly, but I think the question suggests an explanation of why section 347 directs that the accused shall be committed "under the provisions hereinbefore contained" whereas neither section 346 nor section 348 contains those words. These last two sections refer to cases where the Magistrate who eventually commits the accused for trial has from the commencement of his proceedings contemplated such commitment. He is therefore bound by section 207 to adopt throughout the procedure prescribed in Chapter XVIII, and it is accordingly unnecessary in sections 346 and 348 to repeat the provisions of section 207. Under section 347 the conditions are quite different. The Magistrate may have already framed a charge without examining all the prosecution witnesses or without their having been cross-examined: the section therefore wants him that if he decides to commit for trial he must make his proceedings conform to the provisions of the Criminal Procedure Code relating to commitment. Those provisions, and so far as I am aware, all of them are contained in Chapter XVIII of the Code: other sections, *e.g.*, 346 to 348 and 447 lay down certain circumstances under which and the Court to which, a commitment should be made, but so far as I am aware nowhere but in Chapter XVIII is the procedure laid down to be followed in making such commitment. If the words in section 347 "shall stop further proceedings and commit the accused under the provision hereinbefore contained" did not mean that all the provisions of Chapter XVIII were to be complied with, I consider it would have been made clear which provisions were to be, and which need not be followed, by substituting some such words as "under the provisions of section (or sections), so and so of this Code." I feel no doubt that section 347 requires that every commitment made under it shall comply with all the essential provisions of Chapter XVIII. Among them I consider the main provisions to be those of sections 208, 209, and 210, namely, that all the evidence produced in support of the prosecution shall be taken; the accused shall be given an opportunity to cross-examine the witnesses for the prosecution, he shall be allowed to produce any evidence he wishes in his behalf and the Magistrate shall take it, he shall be examined for the purpose of enabling him to explain any circumstances appearing in the evidence against him; and a charge shall be framed declaring with what offence he is charged. These provisions clearly operate greatly in favour of an accused person by giving him full opportunity of showing cause why a commitment should not be made, and by giving him full notice of the case he will have to meet if it is made. They also achieve other desirable ends. They prevent the waste of time entailed upon all concerned by unnecessary commitments. They also help to prevent miscarriages of justice; it is easy to imagine a case where owing to the death of a witness a prosecution

1912.

KING-EMPEROR v. CHANNING ARNOLD.

would fail but for the provisions of section 33 of the Evidence Act, or where an accused person would be greatly prejudiced by the Magistrate's refusal to examine a defence witness whose attendance at the trial it became subsequently impossible to secure, while section 288 of the Code of Criminal Procedure can only be used if the evidence of the witness was duly taken in the presence of the accused before the committing Magistrate, which can only mean taken under the provisions of Chapter XVIII.

In the present case the accused has expressly pleaded that he was prejudiced by the procedure adopted, but even if he had not, I think it must have been held that the commitment was not made according to law and should be quashed.

I concur in the order proposed, by the learned Chief Judge.

Young, J.—The facts of this reference are fully set out in the judgment of the learned Chief Judge with which I concur.

Section 347 runs as follows: " If in any enquiry before a Magistrate or in any trial before a Magistrate before signing judgment it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial he shall stop further and commit the accused under the provisions hereinbefore contained. If such Magistrate is not empowered to commit for trial he shall proceed under section 346."

The first question that is to be decided is whether the words " in any enquiry or in any trial " are exhaustive. If they are exhaustive they constrain the Magistrate to act in flat contradiction of sections 207—210 which are equally imperative; this seems to me improbable, and I think the words "at any stage of the proceedings " tend to show that the proceedings must be in an enquiry in which the Magistrate is not bound to commit if a *primâ facie* case is made out or in a trial which he is competent to hold. In other words, the proceedings must be such that they could be and have been started by the Magistrate with the intention of concluding them himself and then as some stage he must have become satisfied that this original intention was inappropriate and that the case was one which ought to be finally dealt with by a Superior Court.

If then it is not exhaustive and does not apply to cases in which the Magistrate is incompetent to deal with finally, does the section apply to cases which the Magistrate is competent to decide, but in which he becomes convinced at any stage that he ought not to decide. This again would give him power to contravene the same imperative sections of the Code, contained in sections 207—210; section 207 of the present Code is exactly the same as section 207 of the Code of 1882, and provides as follows: " The following procedure shall be adopted in enquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court or in the opinion of the Magistrate ought to be tried by such Court." It is also the same as section 189 of

the Code of 1872 with the significant exception of the last clause relating to enquiries which in the opinion of the Magistrate ought to be tried by such Court. These words were added by the Code of 1882.

Section 347 of the present Code is also the same as section 347 of the Code of 1882.

The analogous section of the Code of 1872 related only to trials. The Code of 1882 extended its provisions also to enquire in which the Magistrate became convinced that the case should be dealt with finally by another Court.

The same Code therefore which extended the provisions of section 347 to these enquiries was careful to provide expressly for the procedure to be a adopted in such cases, and yet if the provisions of section 347 are to enable the Magistrate to commit *at once*, they enable or rather require a Magistrate to act in direct contravention of section 207. These also seems to me improbable.

Yet the section directs him to stop further proceedings and commit under the provisons hereinbefore contained

That "commit" cannot always be construed in its absolutely literal sense is I think clear from a perusal of section 348 as pointed out by Parlett, J. It is to my mind impossible to suppose that a man who falls under section 348 must be committed just because he is accused of a certain offence. The word must be used elliptically and the ellipse must be "if in the Magistrate's opinion there are grounds for committing" section 310 shews when and under what circumstances a Magistrate may be satisfied that there are grounds for committing, and I see no reason why the word "commit" should not be used in a similarly elliptical sense in section 347, and the words "under the provisions hereinbefore contained" in my opinion support such view.

If so, the words "shall stop further proceedings" must mean shall stop further proceedings in the inquiry of trial in which he is engaged.

This was the procedure expressly directed under the Code of 1872.

In that Code the section was confined to warrant cases and found place in the chapter relating thereto, and the section required the Magistrate to stop further proceedings under that chapter.

In the present Code the section is placed in the general chapter and so the reference to the chapter would be inappropriate, but the result will be the same if as I think the section should be construed in the way suggested, *viz*:—so as to refer only to enquiries into offences which he is competent to try himself and which it was his original intention to try if a *primâ facie* case should be made out. I do not think that the words in any enquiry relate to enquiries where *ab initio* the Magistrate has determined to send the case to sessions if a *primâ facie* case is made out, but I think that the words "in any enquiry" were placed in section

1912.

KING-EMPEROR v. CHANNING ARNOLD.

347 by the Code of 1882 simply because of the difficulty of defining in cases triable by Magistrates the stage at which the proceedings ceased to be an inquiry and became a trial, and to enable him to act at the earliest possible stage.

In the present instance the Magistrate was competent to try the case himself but either *ab initio* was or at a very early stage became convinced that the case was one which should if a *prima facie* case were made out be tried not by himself but by the Chief Court. In the one case he should in my opinion have followed the procedure laid down by Chapter XVIII. from the start, in the other he should have stopped further proceedings in the inquiry or trial whichever it may have been, in which he was engaged and adopted the procedure prescribed by Chapter XVIII. I do not think he need have started *de novo*, but he should have allowed the Crown to call such witnesses as it deemed fit, and have allowed the accused to cross-examine them and call witnesses himself if so advised. He has not done this, but has committed in contravention of section 210 and the commitment is therefore in my opinion illegal. I agree that it must be quashed and in the order proposed.

Civil Miscellaneous Appeal No. 18 of 1911.

February 28th, 1912.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

IN THE MATTER OF AN APPEAL OF ISMAIL MAMOON DAWOODJI.

P. P. Ginwala—for appellant.

J. R. Dass—for the Official Assignee.

Insolvency Law - delivery of property belonging to debtor in possession of another—written application of Official Assignee—opportunity for contesting applications prejudicial to any persons interest—sub-section 5 of section 36, Presidency Towns Insolvency Act, 1909.

No order should be passed under sub-section 5 of section 36 of the Presidency Towns Insolvency Act, 1909, for delivery of property belonging to the insolvent in the possession of another person unless the Official Assignee has submitted a written application and the person whose interests are affected by such order has been given an opportunity of contesting the application.

The order appealed against was one under sub-section 5 of section 36 of the Presidency Towns Insolvency Act, 1909. The appellant was summoned and examined under the authority of sub-section 1 of the section as a person known and suspected to have in his possession property belonging to the insolvent, and a person capable of giving information respecting the insolvent, his dealings and property; there is however nothing on the record to show that it was ever communicated to him that he was being summoned as such or that an order against him under sub-section 5 was going to be asked for. There had been correspondence between

1912.

IN THE MATTER OF AN APPEAL OF ISMAIL MAMOON DAWOODJI.

him and the Official Assignee, and he had informed the latter of the transactions about which he was subsequently examined. His advocates had said in their letter of the 5th December that he had signed a promissory note for Rs. 4,500 in 1908 as surety for the insolvents, and he had guaranteed to a British firm the insolvent's purchases from it up to Rs. 10,000, and he had himself supplied the insolvents with goods to the value of Rs. 605. According to the letter the insolvents owed him Rs. 8,068-14-0 made up of Rs. 2,963-14-0 due to Messrs. Finlay Fleming and Company on the guarantee, Rs. 4,500 due on the promissory note to a Chetty, and Rs. 605 due to his own firm for goods supplied. He also claimed Rs. 415-6-9 for freight and incidental expenses on goods which he had possession of. In all his claim against the insolvents amounted to Rs. 8,484-4-9. As against this they said that the insolvents had (shortly before their adjudication) given him promissory notes of the face value of Rs. 7,880-3-6 which the insolvents had taken from purchasers of goods from them. These notes had been made out in the appellant's favour instead of the insolvent's. He claimed to hold them against the amount due to him. He offered to give possession of all goods of the insolvents he had. On his examination he said he had obtained these goods and also the promissory notes from the insolvent's manager at Mandalay in the early part of the month in which the insolvents were adjudicated as a result of his asking them to pay what was due by them to Messrs. Finlay Fleming and to the Chetty.

He would appear not to have had the assistance of an advocate during his examination which consisted of cross-examination by the petitioning creditor's advocate. Later on however an advocate did appear for him. There is nothing on the record to show how the question of an order under sub-section 5 of section 36 arose, as there is no application by the Official Assignee recorded. We have however been informed that a verbal application was made on behalf of the Official Assignee for an order under the sub-section. As such an order can only be made upon application by the Official Assignee, we think that any such application should be in writing signed by the Official Assignee. As the record stands it has the appearance of a claim to a very substantial amount being decided in an extremely summary manner without the appellant having had a sufficient opportunity of knowing on what grounds the Official Assignee claimed to deprive him of property he held as security for what the insolvents owed or might owe him.

Sub-section 5 of section 36 of the Act is adopted from sub-section 5 of section 27 of the English Bankruptcy Act, but whereas the latter enables the Court to make an order for delivery only when the person examined admits that he has in his possession property belonging to the debtor, the former enables the Court to make such an order when the Court is satisfied that

1912.

IN THE MATTER OF AN APPEAL OF ISMAIL MAMOON DAWOODJI.

the witness has property belonging to the insolvent in his possession and the Official Assignee applies for an order for delivery of it to him. Examinations under section 36 may under section 6 be delegated to an officer of the Court, and no doubt sub-section 5 contemplates that the Court should base its order on the examination alone without further inquiry, but at the same time the provision requiring an application by the Official Assignee appears to contemplate that the person examined shall have an opportunity of contesting the granting of an order, for it is a cardinal principle that no order shall be made affecting a person's interest without giving him a sufficient opportunity of contesting the application against him. We will not deal with the grounds on which the order was made. It would now serve no useful purpose to set it aside, but we think it should be modified by giving the appellant liberty to apply to the Court to rank as a secured creditor in respect of the promissory notes he was compelled to deliver up. His claim can then be fully investigated. We do not think there was any sufficient reason for ordering him to pay costs on his examination, and we set aside that part of the order.

We think he should receive his costs of this appeal from the estate of the insolvent's, and order accordingly. We fix the advocate's fee at 3 gold mohurs.

Special Civil 2nd Appeal No. 6 of 1911.

March 6th, 1912.

Before Mr. Justice Twomey.

1. MAUNG SEIN
2. MYA GALE

v. NGWE NU.

Ba Dun— for appellants (defendants).

S. S. Halkar—for respondent (plaintiff).

Mortgage—priority of registered mortgage—oral mortgage—defective pleadings—determination of legal right—section 48, Registration Act, 1908—section 73 and Rule 33, Order 41, Civil Procedure Code, 1908.

A held a registered mortgage of the property of C. B held an oral mortgage of the same property. Although A sought certain relief on the ground that B's mortgage was fraudulent—a ground which was not proved—it was held that in spite of the defective pleadings the legal rights arising out of the priority of A's mortgage under section 48, Registration Act, could be determined, regard being had to the provisions of Rule 33, Order 41, Civil Procedure Code, 1908.

Although the property had been sold in pursuance of B's oral mortgage as it had not been sold subject to A's mortgage the sale was annulled.

The first and the principal question raised in this appeal is whether the lower Appellate Court having found against the respondent's plea that the 2nd appellant's mortgage was fraudulent should not have dismissed the respondent's suit forthwith instead of making out a fresh case for the respondent,

namely,athat her registered mortgage took effect before the 2nd appellant's oral mortgage. Although the claim of priority under section 48, Registration Act, was not expressly set up in the plaint the Divisional Judge considered that he was bound to deal with it as it concerned an obvious legal right. I think this view is correct. An appellant is not allowed to raise in the Court of Appeal a plea which he did not raise in the lower Court where the nature of the plea is such that if raised originally the respondent might have been able to rebut it. But the priority of the respondent's mortgage in this case is clearly not a point on which any rebutting evidence could be forthcoming. It is beyond dispute that the appellant's mortgage is postponed to the respondent's by the operation of section 48, Registration Act. Having regard to the provisions of Order 41, Rule 33, Code of Civil Procedure, I have no doubt that the Divisional Court was right in determining the respective legal rights of the contending mortgagees with reference to the Registration Act in spite of the plaintiff-respondent's defective pleading.

The only other matter for consideration is whether the respondent was not too late to assert her priority after the property had already been sold in pursuance of the appellant's oral mortgage. The sale took place on the 29th June 1909 and was carried out without reference to the respondent's mortgage although a sale decree had been granted on that mortgage on 22nd December 1908 by the same Court. The action of the Court in selling the property without reference to the respondent's mortgage was highly irregular. Under section 73, Code of Civil Procedure, the Court could sell the property free of the respondent's mortgage only with the mortgagee's consent (giving the mortgagee the same rights against the sale proceeds as she had against the property sold). Seeing that the respondent's consent was not asked for or obtained the property should have been sold subject to her mortgage. The irregularity was sufficient to justify the Court in annulling the sale. Instead of doing so the Divisional Court has ordered that the purchaser shall redeem the respondent's mortgage or suffer the land to be resold in satisfaction of that mortgage. But the auction purchaser may lose by this order. The amount realized on resale may not cover the respondent's mortgage debt *plus* the sum of Rs. 230 paid by Maung Sein.

In modification of the Divisional Court's decree I direct that the auction sale shall be annulled and that the respondent is entitled to have the land sold in pursuance of her mortgage decree free from the 2nd appellant Ma Mya Gale's mortgage.

The respondent's costs in this Court will be borne by the 2nd appellant.

Civil Reference No. 4 of 1912

June 19th, 1912.

Full Bench—(Civil Reference).

Before Sir Charles Fox, Chief Justice, Mr. Justice Hartoll, Mr. Justice Robinson and Mr. Justice Parlett.

TIN YA *v.*
1. SUBYA PILLAY.
2. ANNAMELLE CHETTY.
3. SUBRAMONIAN CHETTY.
4. AHMED JAM.
5. SIT WA.

Ba Thein and *Halkar*—for Tin Ya (Insolvent).

K. B. Banurji and *A. B. Banurji*—for Creditors (Respondents).

Insolvency Law—construction of section 15, Provincial Insolvency Act, 1907—fraudulent debtors—method of punishment—inherent powers of Courts—abuse of process of Courts—rejection of petition on ground of obvious fraud—section 55 (4) and section 151, Civil Procedure Code, 1908—sections 6, 14, 15, 16, 27, 43, 44, 47, Provincial Insolvency Act, 1907—sections 27, 41, Presidency Towns Insolvency Act, 1909.

On a reference to a Full Bench under section 11, Lower Burma Courts Act, 1900 it was held that the words "that for any sufficient cause" in sub-section 1 of section 15 of the Provincial Insolvency Act, III of 1907, are governed by the words "satisfied by the debtor" in the same sub-section.

It was further held that a Court exercising jurisdiction under the Provincial Insolvency Act, 1907, has power to reject or dismiss a petition by a debtor for his adjudication as an insolvent, if it considers that such petition is an abuse of the process of the Court. Nothing short of obvious fraud would however render an insolvent liable to have his petition rejected on the ground of such abuse.

Nathu Mal v. *The District Judge of Benares*, (1910) I. L. R. 32 All., 547; *P L. T. A. L. Arunachellam Chetty* v. *Po Thin*, (1910) 4 Bur. L. T 17; dissented from.

Girwardhari v. *Jai Narain*, (1910) I. L. R. 32 All., 645; *Uday Chand Maiti* v *Ram Kumar Khara*, (1910) 15 C. W N., 213; *Seik Samiruddin* v. *Srimati Kadumoyi Dasi*, (1910) 15 C. W. N., 244; followed.

In exparte Painter, L. R. (1895) Q B.D., 85; *In re Hancock*, L. R. (1901) 1. K. B. D., 585; *In re Archer*, (1901) 20 Times Law Reports, 390; *In re Betts*, L. R. (1901) 2 K. B.D., 39; referred to.

Civil Miscellaneous Appeal No. 163 of 1911.

The following reference was made to a Full Bench by the Honourable the Chief Judge and Mr. Justic Hartnoll :—

The appellant had been arrested in execution of a decree. He was released on giving security under section 55 (4) of the Civil Procedure Code to apply to be declared an insolvent. He made such application to the District Court, and a day was fixed for hearing it. On the date to which the hearing was adjourned, the District Judge dismissed the petition on the ground that the appellant had neglected to bring his accounts into Court, and it was mere trifling with the Court for him to come up for his examination without the accounts which would disclose his financial position, and enable him to answer questions about his dealings.

On appeal it has been urged on his behalf that the District Court was not empowered to dismiss the petition on the above grounds, and that under sections 15 and 16 of the Provincial

Insolvency Act the Court was bound on his application to adjudicate him insolvent, since there was no question as to his being entitled to present his petition under the Act.

The question whether the Court was bound to make an adjudication depends, so far as the Act provides, upon the proper construction of the last thirty-three words of sub-section (*1*) of section 15 of Act III of 1907; they are "or is satisfied by the debtor that he is able to pay his debts or that for any sufficient cause no order ought to be made, the Court shall dismiss the petition." In Civil Miscellaneous Appeal No. 133 of 1909 a Bench of this Court held that the above words enables the Court to dismiss a petition for any sufficient cause. This construction separates the words "by the debtor" from the words "or that for any other sufficient cause" so that the section may be read—"Where the Court is satisfied that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition."

The question whether this construction was right was raised in Civil Miscellaneous Appeal No. 55 of 1910, but it was unnecessary to decide it since an adjudication had been made in that case.

In one case in the Allahabad High Court—*Nathu Mal* v. *The District Judge of Benares* (1)—a Bench of that Court construed the sub-section in the same way as this Court had done in Civil Miscellaneous Appeal No. 133 of 1909, but in another later case in the same Court—*Girwardhari* v. *Jai Narain* (2)—another Bench held that the last thirty-three words of sub-section (*1*) of section 15 refer only to the case of an insolvency petition presented by a creditor, and that the words "that for any sufficient cause" are governed by the words "satisfied by the debtor," which involves reading the words as "where the Court is satisfied by the debtor that for any other sufficient cause no order ought to be made.

In *Uday Chand Maiti* v. *Ram Kumar Khara* (3) a Bench of the Calcutta High Court in effect adopted the same construction of the wording in question.

We think that in view of the wording being open to different constructions, the following question should be referred to a Full Bench of this Court for decision, *viz.* :—

Are the words "that for any sufficient cause" in sub-section (1) of section 15 of the Provincial Insolvency Act, 1907, governed by the words "satisfied by the debtor" in the same sub-section,

The District Judge in the present case does not state expressly under what authority he purported to act in dismissing the petition. Judging from the wording of his order it may be that he considered that the application to be adjudged an insolvent was an abuse of the process of the Court.

(1) (1910) I.L.R. 32 All., 547. | (2) (1910) I.L.R. 32 All., 645.
(3) 1910 15 C.W.N., 213.

1912.

TIN YA v. SUBYA PILLAY.

If so, there arises the further question whether a Court exercising jurisdiction under the Provincial Insolvency Act, 1907, has power to reject or dismiss a petition which it considers to be an abuse of the process of the Court.

This question was partially dealt with in the case of *Girwardhari* v. *Jai Narain* (2) but not definitely decided. We consider it desirable that it should be considered and decided by a Full Bench of this Court.

We accordingly refer under section 11 of the Lower Burma Courts Act to a Full Bench of the Court the question above set out and also the question.

Has a Court exercising jurisdiction under the Provincial Insolvency Act, 1907 power to reject or dismiss a petition by a debtor for his adjudication as an insolvent, if it considers that such petition is an abuse of the process of the Court?

July 8th, 1912.

The opinion of the Full Bench was as follows :—

Fox, C.J.—In the case of *P. L. T. A. L. Arunachellam Chetty* v. *Maung Po Thin* (4), the Bench of which I was a member took the same view regarding sub-section (*1*) of section 15 of the Provincial Insolvency Act, 1907 as that expressed by a Bench of the Allahabad High Court in *Nahtu Mal* v. *The District Judge of Benares* (1): this was that the section enabled the Court to dismiss for any sufficient cause a debtor's petition to be adjudged an insolvent. After reconsideration of the wording of the sub-section and of the later judgment of a Bench of the Allahabad High Court in *Girwardhari* v. *Jai Narain* (2) and of Benches of the Calcutta High Court in *Uday Chand Maili* v. *Ram Kumar Khara* (3) and *Sheikh Samiruddin* v. *Srimati Kadumoyi Dasi* (5) I do not think the above view can be adhered to.

The arguments in support of the opposite view are set out in the judgments last referred to and it is unnecessary to repeat them.

I would answer the first question referred in the affirmative.

According to this answer a Court is bound to pass an adjudication order on a debtor's petition when (*a*) his debts amount to five hundred rupees, or (*b*) he has been arrested or imprisoned in execution of the decree of any Court for payment of money, or (*c*) an order of attachment in execution of such a decree has been made, and is subsisting against his property, for in any of such cases a debtor is by section 6 given the right to present an insolvency petition. Upon an adjudication order being made under section 16 the debtor, if in prison for debt, must be released.

As stated in one of the judgments above quoted, the Act has made a complete change in the law in favour of debtors. It is somewhat difficult to see why arrest and imprisonment for debt in execution of decrees for money is retained at all, if an imprisoned debtor can so readily obtain his release.

(4) Bur. L.T.

(5) (1910), 15 C.W.N. (244).

It may be thought also that the examination of the debtor as to his conduct, dealings and property at the hearing of his petition is aimless, if the only thing a Court can do at the end of the hearing is to make an order of adjudication and release him. This thought may be strengthened by the fact that the Act nowhere compels an insolvent to apply for an order of discharge after the adjudication order. Section 44 says that a debtor *may at any time after the order of adjudication* apply for his discharge. The Act contains no provision similar to that in section 41 of the Presidency Towns Insolvency Act which enables the Court to fix by rule a time within which an insolvent must apply for an order of discharge. It is notorious that insolvents outside of Rangoon scarcely ever apply for such an order. Having obtained release from imprisonment, they are satisfied, and there is nothing to compel them to do anything more. The fraudulent debtor is thus in a far more advantageous position than he was in under the old Civil Procedure Codes.

It appears to me however that a change in the procedure of the Courts may prevent the Act from being as ineffectual as it has been up to the present, even when the view adopted in *P.L.T. A.L. Arunachellam Chetty* v. *Maung Po Thin* (4) has been applied.

The examination of a debtor under section 14 of the Act might be regarded as if it were the public examination of an insolvent under section 27 of the Presidency Towns Insolvency Act, that is to say, as a means of discovering as much as can be discovered at the time about the debtor's property, and his conduct and dealings. On passing the adjudication order a date might be fixed for a further examination of the debtor under sub-section (*1*) of section 43 of the Act. The date should be after a period sufficient to give the creditors ample time to investigate the truth of the debtor's statements on his first examination, and to prepare charges against him, if any are so minded, of offences punishable under sub-section (*2*) of the section or to make any representations to the Court against granting him an absolute order of discharge in case the debtor should apply for such an order.

If creditors after being given an opportunity to make representations to the Court regarding an insolvent do not choose to do so, they can scarcely complain of the inefficiency of the law in punishing fraudulent debtors.

In regard to the second question referred under section 47 of the Act a Court exercising jurisdiction under the Act has the same powers as it has in the exercise of original civil jurisdiction. Section 151 of the Civil Procedure Code recognizes there being inherent power in a Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court. If a petition by a debtor appeared to a Court to be plainly an abuse of the process of the Court, I think the Court would have power on that ground to reject it. Similarly if after

1912.

TIN YA v. SUBYA PILLAY.

an adjudication order it were found that the petition of a debtor was a mere abuse of the process of the Court it would have jurisdiction to annul the order and to dismiss the petition.

I would answer the second question referred in the affirmative.

It is impossible to lay down any rule or general statement as to what is an abuse of the process of an Insolvency Court. In *ex-parte Painter* (6), it was held that the presentation of a petition in bankruptcy by a debtor in order to avoid payment of a decree for damages and costs out of his pension was not an abuse of the process of the Court.

Similarly *In re Hancock* (7), the presentation of a petition by a debtor who had no assets beyond his personal earnings, and who had only one creditor was held not to be such abuse. The same was held in the somewhat similar case of *In re Archer* (8). The case of *In re Betts* (9) is the only case which I have been able to discover in which the presentation of a bankruptcy petition by a debtor has been held to have been an abuse of the process of the Court; in that case it appeared that the debtor was in the habit of filing such petitions and that the bankruptcy law was being made use of in order to assist him in his frauds on his creditors, and to enable him to get credit, while all along he had the intention of getting rid of his liabilities by filing his own petition. From these cases in the Courts in England it may be gathered that nothing short of obvious fraud on the part of a debtor would render him liable to have his petition rejected or dismissed on the ground of it being an abuse of the process of the Court.

Hartnoll, J.—I concur.
Robinson, J.—I concur.
Parlett, J.—I concur.

PRIVY COUNCIL.

(On appeal from the Chief Court of Lower Burma.)

Before Lord Macnaghten, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

THE RANGOON BOTATOUNG COMPANY, LIMITED *v.* THE COLLECTOR, RANGOON.

Land Acquisition Act—award—appeals under the Act—no Appeal to the Privy Council—sections 53 and 54, Land Acquisition Act, 1894.

An appeal does not exist in the nature of things and as sections 53 and 54 of the Land Acquisition Act, 1894, do not give a right of appeal to the Privy Council from a High Court's decision, no such appeal lies.

Sandback Charity Trustees v. *The North Staffordshire Railway Company*, L.R. (1877) 3 Q.B.D., 1, referred to.

July 16th, 1912.

The judgment of their Lordships of the Privy Council was delivered by Lord Macnaghten on the 16th July 1912.

(6) L.R. (1895) 1 Q.B.D., 85.
(7) L.R. (1904) 1 K.B.D., 585.
(8) (1904) 20 Times Law Reports, 390.
(9) L.R. (1901) 2 K.B.D., 39.

1912.

THE RANGOON BOTATOUNG COMPANY, LTD. v. THE COLLECTOR, RANGOON.

In this case a preliminary objection was taken to the appeal. Having heard the point fully argued, their Lordships came to the conclusion that the appeal was incompetent and they intimated that on that ground they would humbly advise His Majesty that the appeal should be dismissed with costs.

The appeal purported to be an appeal as of right from an award of the Chief Court of Lower Burma. Some land belonging to the appellants had been taken for public purposes under the provisions of the Land Acquisition Act, 1894. In due course the Collector made his award. The appellants did not accept it. They were dissatisfied with the amount of the Collector's valuation. On that ground and on that ground only they demanded, as they were entitled to do, that the matter should be referred to the Court under the provisions of the Act. The expression "the Court" in the Act is defined as meaning "a principal Civil Court of Original Jurisdiction." The reference was taken by two Judges of the Chief Court. They sat as "the Court" and also as the High Court to which an appeal is given by the Act from the award of "the Court" The hearing of the reference occupied 45 days. More than 100 witnesses were examined. A vast mass of documents was put in and the learned Judges at the request of the parties viewed the premises. Then they made an exhaustive award dealing minutely with the evidence, and they held that the award of the Collector had given the appellants "all and probably more than the full market value of their property," and so they dismissed the reference with costs. They were precluded by the Act from awarding less than the amount awarded by the Collector.

It was admitted by the learned Counsel for the appellants that it was incumbent upon him to show that there was a statutory right of appeal. As Lord Bramwell, then Bramwell, J. A., observed in the case of the *Sandback Charity Trustees* v. *The North Staffordshire Railway Company*, (1): "An Appeal does not exist in the nature of things. A right of Appeal from any decision of any tribunal must be given by express enactment." A special and limited appeal is given by the Land Acquisition Act from the award of "the Court" to the High Court. No further right of appeal is given. Nor can any such right be implied The learned Counsel for the appellants relied both on section 53 and section 54 of the Act. Section 53 enacts, that, "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act." That enactment applies to an earlier stage in the proceedings and seems to have nothing to do with an appeal from the High Court. Section 54 is in the following terms:—

"54. Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from

(1) L.R. (1877) 3 Q.B.D., 1.

1912.

THE RANGOON BOTATOUNG COMPANY, LTD. v. THE COLLECTOR, RANGOON.

the award or from any part of the award of the Court in any proceedings under this Act."

That section seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the rights to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

It is impossible to conceive anything more inconvenient than that a Court in this country should be called upon to review the determination of arbitrators as to the value of a piece of land in India— amere question of fact—without the advantage of any local knowledge or the privilege, if it be a privilege, of seeing the cloud of witnesses who engaged the attention of two Judges of the Chief Court of Lower Burma for 45 days, or even the opportunity and the interest of viewing a property the value of which seems soextraordinarily difficult to discover.

Civil Miscellanous No. 69 of 1912.

July 22nd, 1912.

Before Mr. Justice Robinson.

(Original Civil Jurisdiction.)

1. NORMAN HENRY MATHESON,
2. WILLIAM MCINTOSH } PETITIONERS.

v.

1. THE NATH SINGH OIL COMPANY, LIMITED.
2. HAJI VULLY MAHOMED HAJI ABBA OF 135, MERCHANT STREET, RANGOON—RESPONDENTS.

Giles—for petitioners.

Cowasjee—for respondents.

Company Law—rectification of register—tranfers of shares—Articles of Association—powers of directors—lien—waiver—validity of transfer—reasons for refusal to transfer not to be arbitrary, capricious or wanton—section 58, Indian Companies Act, 1882.

A was the managing Director of a Company to which he was indebted. He deposited a certain number of fully paid shares with a Bank with which he had dealings with intent to create an equitable mortgage. The Bank entered on the blank transfer deed the names of two of its officials who were registered by the Company as the owners of the shares. Subsequently he bought a certain number of these shares : but when asked to register the transfer to B the company refused on the ground that a lien which they claimed to possess under one of the Articles of Association upon A's shares had not been discharged.

Under section 58, Indian Companies Act, 1882, the officials of the Bank applied to the Court for rectification of the register (cross applications were also filed by the Company and by a shareholder in the Company).

After considering the terms of the Articles of the Association it was held that the transfer to the Bank was valid.

The transferees had complied with what was required of them and were entitled to assume that the Company had acted in accordance with its internal regulations so far as sanctioning the transfer was concerned.

The Company were aware of the first transfer shortly after it was effected but took no steps to rectify the register or to set up a claim that their lien upon the shares still existed under one of the Articles of Association. By registering the names of the Bank officials as owners of the shares the Company were therefore estopped from denying that the latter were (as transferors to B such) owners.

It was further held that the Court might consider the grounds advanced by the Company for refusing to register B as an owner of the shares in place of the Bank officials when those grounds were disclosed. Inasmuch as the objection the Company raised to the original transfer was an effort to avoid the consequences of a prior mistake made by them and to obtain a position which by their own act they had waived the reason given by them was regarded as arbitrary. The register was ordered to be rectified by the insertion of B's name

In re Hoylake Railway Company, Ex-parte Littledale, L.R. (1874), 9 Ch. A.C., 257; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company*, L.R. (1895) 1 Ch. Dn., 629; *Balkis Consolidated Company, Limited*, v. *Fr Tomkinson*, L.R. (1893) A.C., 396; *In re Gresham Life Assurance Society*, L.R. (1872), 8 Ch., A.C. 446; *Re Bell Brothers*, 7 L. Times R., 689; followed.

In exparte Sargent, L.R. (1873), 17 Equity, 273, referred to.

These are three applications under section 58 of the Act for rectification of the register of the Nath Singh Oil Company and have been heard together. The facts covered by them are the same and are as follows:—

Baij Nath Singh was the Managing Director of the Company and owed the Company money: it is said Rs. 66,000. He had dealings with the Bank of Bengal and deposited 1,81,020 fully paid up shares with the Bank as security together with a blank transfer duly executed by him The Bank filled up this blank transfer with names of Messrs. Matheson and McIntosh and sent it to the Managing Agents of the Company for registration of the transfer. The Company registered the names of these two gentlemen as the owners of the shares. This was sometime in November 1911. After this had been done on 17th January apparently Baij Nath Singh brought one Haji Vully Mahomed Haji Abba to the Bank as a purchaser of 30,000 of the shares for Rs. 60,000. The Bank received the Rs. 60,000 in settlement of one of the loans made to Baij Nath Singh. This loan had been guaranteed by Mr. B. Cowasjee who was subsequently a Director of the Company. He was released from his guarantee and he took away the documents evidencing the loan. The Bank then proceeded to transfer the 30,000 shares to Haji Abba and sent the transfer and certain share certificates to the Managing Agents of the Company asking for the registration of the transfer. This was under cover of their letter dated 1st February 1912. The Bank received a reply dated 2nd February 1912 "that the Company have resolved not to consent to the transfer of any of Baij Nath Singh's shares to any one until the Company's lien has been discharged." The Bank the same day pointed out that the shares did not stand in Baij

1912.

NORMAN HENRY MATHESON v. THE NATH SINGH OIL COMPANY.

Nath Singh's name and requested that if they still refused to register to return the documents. The Company then on 3rd February asked the Bank to allow the matter to stand over for ten days as two of the Directors were away from Rangoon. The Bank did not agree to this. On the 6th February the Company wrote that the Directors in Rangoon were unable by themselves to act in the matter and asked the Bank to be good enough to let the matter stand over to the end of the week till the other Directors returned. They returned the documents.

The first application is by Messrs. Matheson and McIntosh praying that the Register may be rectified by removal of their names and the entry of that of Haji Abba in their stead. The second is by one M. H. Raja, a shareholder in the Company, praying for rectification by removal of the names of Messrs. Matheson and McIntosh and re-entry of Baij Nath Singh's name. The third is by the Company and prays for the same relief.

Certain further facts are brought out in an affidavit of D. B. Desai who was a Director when the names of Messrs. Matheson and McIntosh were registered. Mr. Paton was the Director who sanctioned the transfer At a Director's meeting held on the 22nd November 1911, that is very shortly after the transfer was registered, Mr. Paton informed his co-directors that Baij Nath Singh had transferred all his shares to Messrs. Matheson and McIntosh of the Bank of Bengal. Mr. Desai protested against being kept in the dark about the matter and stated he would never have sanctioned the transfer. Nothing more however was apparently done. After this meeting Mr. Desai ceased to be a Director, but again became a Director after the annual general meeting held on 30th December 1911. Mr. B. Cowasjee apparently also become a Director for at a meeting held on 17th January 1912 the following resolution was passed unanimously :—

Nath Singh's shares 668.—Mr. Cowasjee asked that it be recorded that the Directors are of opinion that a serious mistake was made in allowing all Nath Singh's shares to be transferred to the Bank of Bengal while there were large sums of money due by him to the Company and other liabilities unadjusted. The responsibility for this proceeding will have to be ascertained hereafter, but in the meantime if Mr. Nath Singh should try and transfer away his shares from the Bank who are his mortgagees to third persons then the Directors shall decline to register such transfer under Article 33 without assigning any reason therefor.

Article 26 of the Articles of Association gives the company a "first and paramount lien" that is, a lien, on all the shares registered in the name of each member for his debts to the Company. It however also provides "Unless otherwise agreed, the registration of a transfer of shares shall operate as a waiver of the Company's line, if any, on such shares." Mr. Giles argues that the registration of the transfer of the shares into the names of Messrs. Matheson and McIntosh therefore operates as a waiver of the Company's line, if any, of these shares. Mr. Cowasjee in reply

argues that the registration was sanctioned by one Director only and was invalid and therefore this provision cannot apply.

The Directors have by virtue of Article 33 the power to decline to register any transfer without assigning any reason. He also argues that the Bank being merely equitable mortgagees of these shares even if the shares are registered in the names of two of its officers the registered holders of the shares only hold them as mortgagees and that therefore the Company's lien still exists and that therefore the Company is entitled to refuse to register the present transfer.

I will first consider the question whether the registration of the names of Messrs. Matheson and McIntosh was invalid. It is said to be so because Mr. Paton directed the registration without consulting his co-directors. There is no express provision in the Articles of Association laying down that acts such as these can only be done by two Directors or at a meeting of Directors or otherwise. Article 90 provides that unless otherwise determined two Directors can form a quorum for a Directors' meeting, but it appears that directors may act either in meeting or by circulating a resolution and signing it or may act through attorneys or managing agents. However this may be the argument cannot prevail for several reasons, even if Mr. Paton's act was beyond his powers as a Director. The Articles provide how transfers of shares are to be carried out. The instrument of transfer is to be signed by both transferer and transferee, Article 30. The form of transfer is given in Article 31 and Article 32 provides that every instrument of transfer shall be left at the registered office of the company for registration accompanied by a certificate of shares to be transferred and such other evidence of the Company may require to prove the title of the transferer or his right to transfer the shares. In this case the provisions of Article 32 have been complied with. The transfer was executed by both parties and it was left at the registered office of the Company with a request for registration accompanied by a certificate of shares. The Company asked for no information and the transfer was registered. Now there is no duty on the transferee to see that the Company have carried out their part in registering the transfer in strict accordance with the Articles of Association. In *In re Hoylake Railway Company, Ex-parte Littledale* (1), it is pointed out by Sir W. M. James, L.J., "If there was any breach of duty on the part of a Director in respect of that transfer, that breach of duty might be the ground of a special action or suit against him." And Sir G. Mellish, L. J., says "It appears to me, therefore, if the Directors assent to a transfer, the property in the shares passes." And in the *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (2), it was held that where the Directors of a Joint Stock Company had power under their articles to fix the number

(1) L. R. (1874), 9 Ch. A.C., 257. (2) L.R. (1895), 1 Ch. Dn., 629.

1912.

NORMAN HENRY MATHESON v. THE NATH SINGH OIL COMPANY.

of Directors which would form a quorum and by a resolution had fixed three then where the affixing of the Company's seal to a mortgage was sanctioned at a meeting of Directors at which two only were present that as between the Company and the mortgagees who had no notice of the irregularity, the execution of the deed was valid and Lord Halsbury in his judgment points out that " Persons dealing with Joint Stock Companies are bound to look at what one may call the outside position of the Company—that is to say, they must see that the acts which the Company is purporting to do are acts within the general authority of the Company." He points out that what was done in this case was something quite different. " It turns out that their own internal regulation was that the number of Directors should exceed two. But that is a matter which was known to them and to them alone. The only external fact with respect to the management of the Company of which an outside person would be cognisant would be that they had power to make any quorum they pleased, and I think he would be entitled to assume that the proper quorum had been properly summoned, and had attended to effect the completion of that instrument." In our present case the transferees complied with what was required of them and they were entitled to assume that the Company would act in accordance with its internal regulation so far as sanctioning the transfer was concerned. Moreover, it appears to me that the Company are now estopped from denying that Messrs. Matheson and McIntosh are the proprietors of these shares. In the *Balkis Consolidated Company, Limited* v. *Fr. Tomkinson* (3), where the Company registered transfer of shares twice over and subsequently discovered the fact and refused to register a *bonâ fide* transfer, it was held that they were estopped by their certificate from denying that the transferer was the proprietor of the shares. In the present case Messrs. Matheson and McIntosh are the registered proprietors of these shares and their names have been endorsed on the share certificate. But further than this the Company was aware in November very shortly after the transfer was registered that the transfer had been registered by Mr. Paton and they knew if it was so that Mr. Paton was acting *ultra vires* of their internal regulations. As I have pointed out they did not apply to rectify the register. They were perfectly aware at the time that the shares which Baij Nath Singh had transferred were shares on which they had a lien provided they had not waived their lien. It was therefore the more necessary for them to have taken immediate action They took no action either to rectify the register or to set up a claim that their lien still existed because the Bank were in their opinion equitable mortgagees of Baij Nath Singh. They gave no notice to the Bank and thereby tacitly allowed the Bank to deal with these shares under the belief that there was no objection to be raised to their ownership

(3) L.R. (1893), A.C., 396.

1912.

NORMAN HENRY MATHESON v. THE NATH SINGH OIL COMPANY.

but still later than this and by a curious coincidence on the very day that the Bank transferred some of these shares to Abba the Directors at a meeting passed the resolution which I have quoted in full.

It is suggested though not asserted that Mr. B. Cowasjee who was guarantor of one of Baij Nath Singh's debts to the Bank was aware that Baij Nath Singh was depositing these shares as security. It seems at first sight likely that he did know but there is no proof and I do not propose to assume that he did; for if he did it appears to me that it was very wrong that the Directors shouldt have passed such a resolution as they did. But the resolution tha they did pass shows that they realized that Nath Singh's shares had been transferred to the Bank of Bengal and that the transfer had been allowed by the company. They then decided that if Nath Singh should try and transfer any of the shares they would refuse to register the transfer and without giving any reasons. Under ordinary circumstances no doubt by Article 33 they would be entitled to refuse to register without assigning reasons and if they did so the Courts would assume that these reasons were *bonâ fide* and would not call upon them to disclose their reasons and would not consider whether they were *bonâ fide* or arbitrary or wanton. But it is clear that they knew that the transfer had been made from almost the time that it took place and thay had never taken any action until, after the refusal to register the transfer to Abba, the application was filed to rectify the register.

I am therefore of opinion that the Company are bound to recognize Messrs. Matheson and McIntosh as such proprietors of these shares. Article 26 by which the lien is given to them lays down that "unless otherwise agreed, the registration of a transfer of shares shall operate as a waiver of the Company's lien, if any, on such shares." *In ex-parte Sargent* (4), it was held that where the owner of shares borrows money on them and deposits with the lender certificates of his shares and transfers thereof signed by him but with the date and name of the transferee left blank, the lender has implied power to fill up the blanks, and the transfers will pass the legal interest to convey a good title and entitle the lender to have his name on the register. Thus it would appear that the contention put forward on behalf of the Company is not sound. But without deciding this question it is sufficient to hold that whatever the decision might be the Company have waived their right to hold their lien on these particular shares. But the Company in this case has disclosed the ground on which they have refused to register the name of Haji Abba in place of Messrs. Matheson and McIntosh. *In re Gresham Life Assurance Society* (5) is authority for holding that the Court can and should consider the grounds of refusal when those grounds are

(4) L.R. (1873), 17 Equity, 273. | (5) L.R. (1872), 8 Ch. A.C., 446.

1912.

NORMAN HENRY MATHESON v. THE NATH SINGH OIL COMPANY.

disclosed. I would also refer to the case of *In re Bell Brothers* (6), but unfortunately I have not been able to obtain this authority as it has been mislaid. It lays down that the Directors must not exercise their powers to refuse the register arbitrarily, capriciously or wantonly and further that they are not entitled to go beyond their register. Now the only reason which the Company has put forward in this case for refusal to register is that they have a lien on these shares, that a mistake was made in originally registering the names of Messrs. Matheson and McIntosh and their reason is merely an effort to try and avoid the consequences of what they consider to be their prior mistake and to obtain a position which by their own deliberate act they have waived. It would be fatal if a Company could act in this manner. No registered holder of shares would be safe if objections of this kind could be allowed to prevail. I consider that the objection is arbitrary and should not be allowed to prevail.

As regards the application by the shareholder and the Company to rectify the register by removing the names of Messrs. Matheson and McIntosh and restoring that of Baij Nath Singh, I reject the applications.

As regards the application of Messrs. Matheson and McIntosh I am of opinion that the Company were not justified in refusing to register the name of Haji Vully Haji Mahomed Abba for the reasons given above and I direct that the register be rectified by the insertion of his name as prayed.

The Company must pay the costs of petitioners in Civil Miscellaneous No. 69 of 1912; the matter required considerable work and I allow as advocate's fees ten gold mohurs. There will be no order as to costs in the other two applications as all three have been heard together.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Harlnoll.

Civil 1st Appeal No. 122 of 1910

August 5th, 1912.

MIN DWE *v.* C. A. P. C. SHUMMUGAM CHETTY.

R. N. Burjorjee—for appellant.

S. S. Halkar—for respondent.

Administration Law—decree-holder's claims against assets of estate—decree-holder distinguished from ordinary creditor—application for execution not precluded—section 104, Indian Probate and Administration Act, 1881—section 282, Indian Succession Act, 1865—section 52, Code of Civil Procedure, 1908.

Section 104 of the Indian Probate and Administration Act, 1881, merely lays down a rule of procedure as to the equal and ratable payment of all debts of on estate and does not preclude a creditor who has obtained a decree against the estate of a deceased person from applying for the execution of such decree.

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(6) 7 L. Times R., 689.

Nilkomul Shaw v. *Reed*, (1872) 12 Ben. L.R., 287; *Pemfry* v. *De Penning*, (1884) I.L.R. 10 Cal., 929; referred to. *Venkatarangayan Chetti* v. *Krishnasami Ayyangar*, (1898) I.L.R. 22 Mad., 194; followed.

Harlnoll, J.—The respondent firm held a money decree on which some Rs. 3,719-6-6 were outstanding against Ma Min Dwe as administratrix of the estate of U Pa deceased and applied for execution of it by the attachment and sale of certain immoveable property which was alleged to form part of the estate. Ma Min Dwe objected to the issue of execution claiming that section 104 of the Probate and Administration Act was applicable and that therefore till she had had time to realize the whole estate and find out how far the assets would extend no creditor could claim payment. The learned District Judge overruled the objection and directed execution to proceed.

This appeal was accordingly laid and it was urged that section 104 of the Probate and Administration Act was applicable.

The point has been discussed in various cases. In that of *Nilkomul Shaw* v. *Reed* (1), it was held that where a person obtains a decree against an executor or administrator he is entitled to have his decree satisfied out of the assests of the deceased and section 282 of the Indian Succession Act which corresponds to section 104 of the Probate and Administration Act does not interfere with that right. In commenting on section 282 of the Indian Succession Act, Gouch, C. J., said: "All that it does is to point out the mode in which the executor or administrator is to administer the assets of the deceased, but it does not enable the executor or administrator, where a decree has been obtained against him, to say that no portion of the assets of the deceased person is to be paid in satisfaction of the decree, but he is to deal with them just as if no decree has been passed. In the case of *Pemfry* v. *De Penning* (2), it was held, that, where a decree for money had been obtained against a person, who afterwards died intestate and where letters-of-administration to his estate were granted to the Administrator-General of Bengal and the decree-holder applied for execution of his decree against the assets in the hands of that official, he was entitled to have his decree satisfied out of the assets of the deceased, although those assets were not sufficient to pay in full all the claims made against the estate. Again in the case of *Venkatarangayan Chetti* v. *Krishnasami Ayyangar* (3), it was held that the right of the decree-holder under section 234 of the Civil Procedure Code to have his decree executed against the legal representative of a deceased judgment-debtor is not affected by section 104 of the Probate and Administration Act. The ruling in *Milkomul* v. *Reed* (1) quoted above was followed. It seems to me that the principle as laid down by the above rulings must be followed in this case. Section 104 of the Probate and Administration Act merely lays down a rule of procedure that must be

(1) (1872) 12 Ben. L.R. 287. | (2) (1884) I.L.R. 10 Cal., 929,
(3) (1898) I.L.R. 22 Mad., 194.

1912.

MIN DWE
v.
C. A. P. C.
SHUMMU-
GAM
CHETTY.

followed by an executor or administrator and is not applicable where a creditor who has obtained a decree against the estate of a deceased person applies for execution of such decree. Section 52 of the present Code of Civil Procedure lays down what the rights of such a creditor are and the first part of it is perfectly clear in its terms. It lays down that where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of such property.

I would therefore dismiss this appeal with costs, allowing an advocate's fee of three gold mohurs.

Fox, C.J.—I concur.

Criminal Appeals Nos. 514, 515, 516, 517 and 518 of 1912.

August 19th, 1912.

Before Mr. Justice Hartnoll and Mr. Justice Young.

1. PO LAN
2. PO THWE
3. PAN NYUN
4. YA GYI
5. NGA SHEIN

v. KING-EMPEROR.

Kidnapping—with a view to murder—with a view to ransom—law applicable—insufficiency of punishment—sections 364, 365 and 387, Indian Penal Code, distinguished—section 71 and section 383, Indian Penal Code—section 35, Criminal Procedure Code.

Where a person has been abducted in order that he may be held to ransom his abductors can be convicted under section 365, Indian Penal Code, as the intent secretly and wrongfully to confine is always present but there can be no conviction under section 364, Indian Penal Code, unless the intent to murder or so to dispose of as to be put in danger of being murdered is strictly proved as such an intent is not a necessary consequence of abducting to hold to ransom. Section 387, Indian Penal Code, was also held to apply to a case of this nature ; but under section 71, Indian Penal Code, read with section 35, Criminal Procedure Code, 1898, separate sentences cannot be passed under both section 365 and section 387, Indian Penal Code. The punishment provided by law may be insufficient but Courts can only administer the law as they find it.

Full Bench Ruling—*Queen-Empress* v. *Aw Wa*, 1 L.B.R. 33, followed.

Hartnoll, J.—On the night of the 4th increase of Pyatho last (23rd December 1911) Maung Pein, son of one Maung Tun, and Maung Tun's cooly Maung Po Lin were sleeping at Maung Tun's threshing floor outside the village of Kayu-chaung when they were seized and blindfolded by a gang of men and taken away. After going some little distance, Maung Po Lin was released with instructions to go to Maung Pein's father Maung Tun and to tell him to bring Rs. 3,500 to Titidusan. Maung Po Lin told Maung Tun as requested Maung Tun relates how he went to Okkan and borrowed Rs. 2,000 on the 5th increase. The next day—the 6th increase—he went to Titidusan with the Rs. 2,000 but found no one. He went again in the evening without result. On the 8th increase Tun Hla and Nawa brought him three

1912.

PO LAN v. KING-EMPEROR.

threatening letters, two of which Tun Hla states he found on Maung Tun's land fastened in a cleft bamboo and one of which Nawa states that he found near his threshing floor. The one Nawa found threatens Nga Pein with death unless the ransom Rs. 3,500 were paid. The other two purported to come from Nga Pein though they were not in his handwriting and are to the effect that he will have to die unless ransomed. Maung Tun made another attempt by going to the place appointed —Gindeiksan—but nothing transpired. The same night owing to the action of Maung Shwe Ya, Ywathugyi of Sibin, a village in the vicinity, Maung Pein was rescued. There was a hut outside Sibin occupied by another Maung Tun the inmates of which Maung Shwe Ya suspected. He made enquiries accordingly. In the evening of the 8th increase he saw appellant Maung Shein in the village and questioned him. Maung Shein is the cousin of Maung Tun's wife—the Maung Tun who lived in the suspected hut. Maung Shwe Ya had information that on the 8th increase he had been with three other occupants of the hut. Maung Shein then admitted that he, Po Lan, Ya Gyi, Po Thwe, Pan Nyun and Po Kyaw had abducted Maung Pein, that he and Ya Gyi, Po Lan and Po Thwe had gone to demand the ransom and that Pan Nyun was watching Maung Pein in the Kangale jungle. Maung Shwe Ya sent out a party to arrest Pan Nyun and find the boy. This party did not find the boy at the spot indicated in the Kangale kwin but on the way they met Pan Nyun, Po Kyaw and Shwe Nyun Gyi. These men were taken to Maung Shwe Ya. Pan Nyun and Po Kyaw were arrested. Shwe Nyun Gyi offered to point out the boy and was sent out with a party to do so. He pointed out Maung Pein who was in the bed of a creek about 100 feet from where the first party had already been. The lad was in a sitting position with his arms tied behind his back round a sapling. He was blindfolded and insufficiently clad. It was the cold weather. He was in a great state ot exhaution. He lost his senses before he reached the village, and certain of the witnesses think that he could not have survived much longer. Maung Po Kyaw has been offered a pardon and he incriminates the appellants. Shwe Nyun Gyi also incriminates Po Kyaw and Pan Nyun; but there is reason to think as he pointed out the lad that he was concerned. Po Kyaw's wife Ma Pwa Shin and Maung Tun, the occupier of the house, also incriminate the appellants. At Sessions Maung Tun did not do so except by implication; but before the committing Magistrate he did and his deposition before the latter Court was admitted as evidence at the trial under section 288 of the Code of Criminal Procedure. Now Po Thwe and Pan Nyun are Maung Tun's sons. Po Kyaw is his son-in-law. Maung Shein is his wife's cousin. Po Lan and Ya Gyi, are his coolies. Po Lan, Ya Gyi, Pan Nyun and Po Kyaw live in his hut and Po Thwe in a hut nearby. Nga Shein lived in the neighbouring village of Sibin. Po Kyaw was clearly in the crime for he produced on the 9th increase a concertina and umbrella taken away when Nga Pein was abducted. I can see no good reason for doubting that Po Kyaw has sub-

1912.

PO LAN v. KING-EMPEROR.

stantially told the truth. There must have been a gang to have taken away the two men Nga Shein when questioned implicated the same men as Po Kyaw. When his information was acted on, Pan Nyun and Po Kyaw are found near where Nga Pein was recovered. It is natural that those who lived with Po Kyaw and his relatives should be involved. A handkerchief left at the scene of the abduction is identified by Po Thaung, and independent witness as belonging to Po Thwe. It is of a distinctive character having a crochet border. I believe Maung Tun's statement made before the committing Magistrate. He is not likely to have implicated his sons, cousin and coolies unless they were in the abduction. As regards Ma Pwa Shin it must be remembered that, though she is Maung Po Kyaw the informer's wife, she is sister to Po Thwe and Pan Nyun and related to Maung Shein, The defence is a denial but it is not substantiated in any trustworthy manner. It seems to me proved that all the appellants took part in the abduction of Maung Pein and in the subsequent extortion. As regards the extortion section 34 of the Indian Penal Code applies.

Maung Po Lan has been convicted under sections 364 and 387 of the Indian Penal Code. He has been previously convicted under sections 379 and 380, and he was sentenced to transportation for life for each offence, the sentences to run concurrently. The other four appellants have been convicted under section 364 of the Indian Penal Code and sentenced to transportation for life.

Section 364 is in the following terms : " Whoever kidnaps, or abducts, any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered shall be punished with transportation for life, etc. etc." In the present case it has been found that appellants abducted Maung Pein in order that he might be so disposed of as to be put in danger of being murdered. After the most careful consideration, I have come to the conclusion that the section is not applicable. Maung Pein was abducted in order that he might be held to ransom. If it was a neccessary consequence that he would also be so disposed of as to be put in danger of being murdered it might be held that there was the double intent and that section 364 would apply as well as one of the extortion sections when the demand for ransom came to be made. For instance in this class of crime which is of recent growth in Burma, there is always present the intent to cause the person abducted to be secretly and wrongfully confined and so section 365 can always be held to apply as well as the appropriate extortion section, for it is always a necessary consequence of the abduction. But it is not a necessary consequence of the crime that the victim is always in danger of being murdered, and so that intent has always to be proved. Unfortunately the character of the crime is such that victims are sometimes murdered owing to such reasons as the victim identifying the abductors, or the abductors being enraged at not getting the ransom required ; but it cannot be said that the abduction is always in order to murder or so dispose of as to be in danger of being murdered. That may be an indirect consequence in certain instances. The main object

1912.

PO LAN v. KING-EMPEROR.

of the abduction is in order to obtain money. In a case I decided a few days ago a little girl was abducted and kept hidden in a forest the whole day. She was released in the evening when ransom was paid. As far as the evidence went she was never in danger of being murdered during the period of her incarceration. I am therefore unable to hold that section 364 is applicable in this case. Maung Pein was abducted in order to extort money from his relatives and as it did not follow as a matter of course that he was in danger of being murdered, the conviction under section 364 cannot in may opinion stand. A conviction however under section 365 is justifiable as though the main object was to extort money yet it necessarily followed that the abductors had the intent to secretly and wrongfully confine him. But under section 365 the maximum sentence is seven years' rigorous imprisonment and according to the learned Sessions Judge such a term is not sufficient in a case of this nature. It is therefore a question for consideration as to whether another section as well as section 365 cannot be made applicable to Maung Ya Gyi, Pan Nyun, Po Thwe and Nga Shein so that an extra sentence can be imposed on them. They were charged under section 387 and that section is clearly applicable to them. Its terms are : "Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished, etc., etc.," and extortion for the purpose of this case is : " Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property commits extortion." The four men can clearly be convicted under section 387 ; but the question arises whether having in view the provisions of section 71 of the Indian Penal Code and the explanation to section 35 of the Code of Criminal Procedure two sentences can be passed. The question was discussed in the Full Bench Ruling *Queen-Empress* v. *Aw Wa* (1). The first part of section 71 of the Indian Penal Code is : " Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences unless it be so expressly provided. " In the present case was the abduction a part of the offence under section 387 ? The abduction was in order to commit extortion. It commenced the process of putting Maung Pein's relations in fear of death to Maung Pein and to my mind is part of the facts constituting the offence under section 387. Illustration (*b*) to section 383 is very opposite in considering the present facts. I would therefore hold that the facts of the case come within the rule stated in the first part of section 71 of the Indian Penal Code and that being so there cannot be separate sentences passed under both sections 365 and 387. It may be that the appellants other than Po Lan in the present case and persons charged in similar cases

(1) L.B.R., 33.

1912.

PO LAN v. KING-EMPEROR.

may not receive sufficient punishment for crimes of this nature and in this respect I am inclined to agree with the learned Sessions Judge for in the present case Maung Pein was wrongfully confined for four days and nearly died and in similar ones there is grave danger of murder and sometimes murder ; but the Courts can only administer the law as they find it. If the State considers the punishment for this kind of crime insufficient there can be legislation.

I would reverse the conviction on Maung Po Lan under section 364 and set aside the sentence passed on him under that section. I would confirm the conviction on him under section 387. As he is liable under section 75 of the Indain Penal Code to enhanced punishment and appears to have been the ring-leader in this crime I would confirm the sentence of transportation for life passed under section 387. As regards Po Thwe, Pan Nyun, Ya Gyi and Nga Shein I would alter the convictions on them to convictions under section 365, Indian Penal Code, and alter their sentences to sentences of seven years' rigorous imprisonment.

Young, J.—I concur.

Before Mr. Justice Hartnoll and Mr. Justice Young.

Civil 1st Appeal No. 20 of 1911.

1. KAN GYI
2. MA HTAI

v.

1. MA PYU
2. PO NYO

BY THEIR AGENT MAUNG SAN WIN.

August 20th 1912.

D. N. Palit—for appellants (defendants).

R. S. Dantra—for respondents (plaintiffs).

Buddhist Law : Inheritiance—share of paternal and maternal uncles and aunts of a deceased nephew or niece—Kinwun Mingyi's Digest, 103, 296, 308, 311.

The paternal and maternal uncles and aunts of a deceased nephew or niece should, in the absence of any nearer relatives and in spite of the father of such nephew or niece having predeceased the mother or *vice versa*, share equally in the estate.

Tun Aung v. *Yan Pyo*, (1897—01) 2 U.B.R., 172, referred to.

Hartnoll, J.—This is a suit concerning the estate of one Ma Thein May. Her parents were Maung Po Kyi and Ma San, who both predeceased her. Maung Po Kyi died before Ma San. Ma Thein May died in November 1904 without leaving any issue but she left the following near relations surviving her—

Ma Pyu the younger sister of Maung Po Kyi ;
Maung Po Nyo the younger brother of Maung Po Kyi ;
Maung Kan Gyi the elder brother of Ma San ;
Ma Shwe Htai the younger sister of Ma San ;
Ma Shwe Me also the younger sister of Ma San.

The plaintiffs are the first two of the above, and the defendants the last three. The plaintiffs sued the last three for their

1912.

KAN GYI v. MA PYU.

share of Ma Thein May's estate. Maung Kan Gyi and Ma Shwe Htai resisted the claim. Ma Shwe Me did not do so. The District Court gave the plaintiffs each a fifth share in the estate and it is against that decision that Maung Kan Gyi and Ma Shwe Htai appeal.

The first two grounds taken are those of Buddhist law. In the first place it is argued that, as Ma San died after Maung Po Kyi, Ma Thein May's property should go to the relatives of Ma San. In the second place it is urged that as there was neglect on the part of the relatives on the paternal side they have lost their right to inherit. As regards the first point sections 296 and 308 of the Kinwun Mingyi's digest were relied on. Section 296 only partially deals with the matter. Section 308 is not applicable. Section 103 was referred to but that obviously relates to an archaic state of society. The right section to apply is section 311. The general rule to be drawn from a consideration of the texts in that section is that there is no preference of the paternal over the maternal side and *vice versa* and that seems to be in accordance with common sense as there is no reason why one side should be preferred to the other. It was followed in the case of *Tun Aung* v. *Yan Pyo* (1). I do not see how the fact that Ma San died after Po Kyi affects the question. It is not her estate that is in dispute but that of her daughter Ma Thein May. On the second point that the respondents have by neglect forfeited their rights I would only say that no such neglect as would entitle forfeiture of inheritance is proved. Ma Thein May lived with the appellants, but she had her own property and could look after herself. She may have been fonder of appellants than the rest of her relatives but that is no good ground for disinheriting the latter. In the absence of specific instances of neglect the contention cannot prevail.

The remaining grounds are that the District Court should have granted an adjournment on the 31st October 1910, and that appellants' advocate had no instructions to abandon certain issues. I am unable to see that the District Judge exercised an unwise discretion in refusing the adjournment asked for. The appellants were represented by counsel and if they wanted Mr. Halkar they should have seen that he did not go to Toungoo. I also see nothing in the contention that Maung Lu Ni had no power to abandon certain of the issues. He did so and presumably on instructions. Maung Kan Gyi was in Court that day and so were four of the witnesses out of the five cited by him. When he saw that matters he wished gone into were not alluded to he should have himself objected and brought it to notice. That he did not, shows that Lu Ni acted on instructions and in any case he did abandon certain issues and this abandonment cannot now be disputed.

I would dismiss the appeal with costs.

Young, J.—I concur.

(1) (1897—01) 2 U.B.R. 17

Civil 1st Appeal No 37 of 1911.

August, 26th, 1912.

Before Mr. Justice Hartnoll and Mr. Justice Young.

KADER HOOSEIN BY HIS DULY APPOINTED GUARDIAN BA CHO *v.* C. R. MUDALIAR.

May Oung— for appellant (defendant).

Minors—loans to guardian of a minor—legal responsibilities of lenders—necessity of loans to be proved—Trevelyan on Minors, 3rd Edition, page 186.

The guardian of a minor borrowed Rs. 7,000 on two promissory notes in order to meet the expenses of a suit brought in the interests of that minor. The costs taxed by the Court amounted to Rs. 2,807. The lender recovered Rs. 4,260 on one promissory note and sued for Rs. 6,120 on the other.

It was held that, as the costs could not reasonably have amounted to anything like Rs 7,000, and as the lender was bound to enquire into the necessities for the loan he could not recover sums lent in excess of the probable requirements of the litigation.

Hunoomanpersaud Panday v. *Mussumat Babooee Munraj Koonweree*, 6 More's I A., 393 at p. 424, followed.

Gunga Pershad v. *Phool Singh*, 10 W.R., Civil, 106, *Azuddin Hossain* v. *Lloyd*, (1883) 13 C.L.R. (O'Kinealy), 112; *Sundararaja Ayyangar* v. *Patianathusami Tevar*, (1894) I.L.R. 17 Mad., 306; *Surendra Nath Sarkar* v. *Atul Chandra Roy*, (1907) I.L.R. 34 Cal., 892; referred to.

Hartnoll, J.—This was a suit to recover Rs. 6,120 due as principal and interest on a promissory note from the estate of a minor Kader Hoosein The promissory note was for Rs. 4,500 and is dated the 13th July 1906. One Edward Rivers was then the guardian of the person and property of the minor and the note is signed by him in that capacity. Rivers is now dead and Maung Ba Cho has been sued in the same capacity. The District Court has granted the decree asked for, and this appeal is against that decree. The minor by his next friend and guardian Rivers did bring a suit against one Maung Ohn Ghine on the 24th July 1906, for the administration of his deceased fathers, estate and for possession of his share in it and obtained a decree that his share be delivered to Rivers. The total costs of the minor in that litigation in the District and this Court as taxed by the Court amounted to Rs. 2,807. It appears that in addition to the sum lent on the promissory note the subject of this suit the respondent lent another sum on another promissory note for which he has obtained a decree amounting to Rs. 4,260. The amount lent on this other note was Rs. 2,500 and the date of it was the 26th May 1906. Appellant did not bring his suit on this note till the 26th May 1909. It was Civil Regular No. 199 of 1909 of this Court.

It seems to me that respondent should not succeed in his suit, as he has not shown that there was due necessity for this loan. When lending money to a person on behalf of a minor and for the use of a minor it is incumbent on a lender to satisfy himself as to the necessity for the loan—*see* Trevelyan on Minors, Third Edition, page 186, and the cases therein referred to. Though at page 186 Trevelyan is only dealing with money lent on security of a minor's estate the same principle applies when money is lent on a promissory note. In the case of

1912.

KADER HOSSEIN v. C. R. MUDALIAR.

Hunoomanpersaud Panday v. *Mussumat Babooee Munraj Koonweree* (1), their Lordships say: "The lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing that the manager is acting in the particular instance for the benefit of the estate." The following cases are particularly approapriate in showing that the appellant must show the actual necessity for the loan—*Gunga Pershad* v. *Phool Singh* (2), *Azuddin Hossein* v. *Lloyd* (3), *Sundaraja Ayyangar* v. *Pattanathusami Tevar* (4), and *Surendra Nath Sarkar* v. *Atul Chandra Roy* (5). Applying the above stated principle to the present case what do we find? Respondent lent Rs. 2,500 on the 25th May 1906 and Rs. 4,500 on the 13th July 1906; in all he lent Rs. 7,000. The taxed costs of the litigation came to Rs. 2,807 only. It may be that they were more actually than Rs. 2,807 but it is difficult to see how they could have reasonably amounted to anything like Rs. 7,000. The suit was finished in the District Court in the 19th August 1907, and the minor's costs were then taxed at Rs. 2,142-9-0. It is not shown why respondent did not then promptly try and recover the money due on the Rs. 2,500 promissory note and so save the minor the expense of continuing interest. He lets the note run on to the 26th May 1909, and this action of his if it was dilatory let the minor in for increase expense. When he sued respondent obtained a decree for Rs. 4,260 which was much over the taxed costs in amount.

As it is not shown that the Rs. 4,500 were wanted for the litigation and as respondent has obtained a decree for Rs. 4,260 against the estate, I am of opinion that he should not get a decree in the present suit.

I would therefore set aside the decree of the District Court. I would also give appellant his costs of this appeal.

Young, J.—I concur.

Before Mr. Justice Hartnoll and Mr. Justice Young.

Special Civil 2nd Appeal No. 206 of 1911.

September 2nd, 1912.

MA YI BY HER GUARDIAN *ad litem* THET PON

v. MA GALE.

Maung Kin—for appellant (plaintiff).

D.N. Palit—for respondent (defendant).

Buddhist Law: Inheritance—dissolution of marriage—claim of children—absence of filial relationsship— similarity of status under adoption and after devorce.

A was the daughter of B and C who had separated and after a period remarried—B marrying D.

A through her mother C sued D for a portion of the inheritance of the deceased B.

(1) 6 Moore's I. A., 393, at p. 424.
(2) 10 W. R., Civil 105.
(3) (1883) 13 C. L. R. (O'Kinealy), 112.
(4) (1894) I. L. R. 17 Mad., 306.
(5) (1907) I. L. R. 34 Cal., 892.

1912.

MA YI
v.
MA GALE.

It was held first that the marriage between B and C was dissolved: and secondly that children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed. In the cases of divorce and adoption it is the will of the parents which decides the disposition of the children.

Thein Pe v. *U Pet*, 3 L. B. R., 175; *Mi Thaik* v. *Mi Tu*, S. J. L. B., 184, 2nd edition; *Ma Baw* v. *Ma Mon*, 4 L. B. R., 272; *Ma E Me* v *Bo Mya*, 11 Bur. L., R., 316; *Ma Pon* v. *Maung Po Chan*, 2 U. B. R (1897—01) 116; *Ma San Mra Rhe* v. *Me Than Da U*, 1 L. B. R., 161; *Maung Hmat* v. *Ma Po Zon*, P. J. L. B., 469; followed;

Maung Pe v. *Ma Myitta*, 2 Chan Toon's L. C., 220; *Ma Thet* v. *Ma San On*, 2 L. B. R., 85; referred to.

Harinoll, J.—In the case Ma Yi by her next of kin and natural mother Ma Thet Pon sued Ma Gale under the following circumstances. Ma Yi's father was Maung Chan Tha, who married her mother Ma Thet Pon about the year 1255 B. E. Ma Yi was born to them in the year 1257 B.E. In that year Ma Thet Pon sued Maung Chan Tha for divorce in the Civil Court and lost her case. She and Maung Chan Tha did not come together again but lived separately. Then in or about the year 1261 B.E. they both re-married, Maung Chan Tha marrying the defendant Ma Gale. Maung Chan Tha died in the year 1272 B.E. leaving as his issue with Ma Gale one child of tender years. Ma Yi sues Ma Gale for her share of the inheritance. She claimed on the grounds that there was no division of property at the time of her mother's divorce from Maung Chan Tha and because that even up to the time of bringing the suit she had not attained the proper age to carry out the duties of a child. Ma Gale contested the suit on the grounds that Maung Chan Tha had been living separately since 1257 B.E., that since then Ma Yi had been living with her mother Ma Thet Pon, that she never once visited her father Maung Chan Tha till the year 1272 B.E. and has never carried out the duties due to her father, and that as she had always been living with her mother she was not entitled to inherit her deceased father's estate. The learned District Judge found that Ma Yi was entitled to inherit and awarded her a five-eight share in the property Maung Chan Tha brought to his marriage with Ma Gale and a one-eight share of the *letletpwa* property of that marriage. On appeal the learned Divisional Judge held that Ma Yi was not entitled to inherit any of her father's estate and dismissed her suit with costs.

She appeals from this decision and takes two points:

(1) that the marriage between Maung Chan Tha and Ma Thet Pon was never dissolved;

(2) that even if it was she is entitled to inherit her father's estate as there was no division of property when her parrents separated and as she being a minor at the time of the separation and up to the time of Maung Chan Tha's death had no opportunity of exercising her choice to live with her father and perform the duties of a daughter to him. It is admitted that there has never been any filial relationship between Maung Chan Tha and Ma Yi. Concerning the first point I have no doubt

that the marriage tie was dissolved between Maung Chan Tha and Ma Thet Pon. The law on the subject was discussed in the Full Bench Ruling, *Thein Pe* v. *U Pel* (1). There was mutual abandonment of each other for more than the prescribed periods and both remarried. When Ma Thet Pon remarried that was clearly an act of volition on her part showing that she considered the marriage tie with Maung Chan Tha dissolved and, when Maung Chan Tha took no steps against her and her second husband to assert his rights as her husband, it seems clear that he finally abandoned her as his wife. They each started a new home and I must answer that first point by holding that the marriage tie was dissolved between them in or about the year 1261 B.E.

The second point has been one of considerable discussion. The first case relating to it is that of *Mi Thaik* v. *Mi Tu* (2) and the last that of *Ma Paw* v. *Ma Mon* (3). Many of the intermediate cases are discussed in the last ruling. In the last mentioned case that of *Ma E Me* v. *Po Mya* (4) was not referred to. In this case the same grounds were taken as in the present one and were not allowed. It seems to me that appellant has no right to inherit for, when the marriage tie between her parents was dissolved, she was taken by her mother and has remained with her ever since and this must have been with her father's consent. As has been pointed out in the various cases parents have a right of control over their children, and in the case of a divorce a position very analogous to that of adoption arises. In adoption parents give away their children to others and unless filial relations are resumed the children so given away loose all rights of inheritance from their natural parents. In the case of young children their wishes are not consulted. It is the will of the natural parents and those who adopt them which decides the matter. Similarly in a case of divorce where the children are of tender years it is the will of the parents which decides the disposition of the children and I think that it must be held similarly that children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed. The remarks of Mr. Thirkell White in the case of *Ma Pon* v. *Maung Po Chan* (5) and of Birks, J., in the case of *Ma San Mra Rhe* v. *Mi Than Da U* (6) quoted in the case of *Ma Paw* v. *Ma Mon* (3) above referred to seem very appropriate, as also those of Mr. Copleston, J. C., in the case of *Maung Hmat* v. *Ma Po Zon* (7) when he said:

"A child removed from the father's family and continuously resident with her divorced mother, after she is of an age when she might assist in the affairs of her father's family, appears to be in the position nearly of a child adopted from the father's family and while she acquires or retains rights in her mother's or

(1) 3 L. B. R., 175.
(2) S. J. L. B., 184, 2nd Edition.
(3) 4 L. B. R., 272.
(4) 11 Bur. L. R., 316.
(5) 2 U. B. R., (1897—01), 116.
(6) 1 L. B. R., 161.
(7) P. J. L. B., 469.

1912.

MA YI
v.
MA GALE.

new family's property, she loses rights in the family whence she came."

It is true that in the case of *Maung Pe* v. *Ma Myitta* (8) a daughter, who had lived with the divorced wife, was given a share of her deceased father's estate, but in that case it was held the father was on very effectionate terms with the daughter, had her to stay with him and never regarded her as cut off from his family—in other words that there were filial relations subsisting. Similarly in the case of *Ma Thet* v. *Ma San On* (9) where a similar decision was given it was found that filial relationship between the daughter and father was resumed and continued for many years after the separation. In the present case there never were any filial relations between father and daughter and I am of opinion that the daughter has no right of inheritance to the father's estate.

I would therefore dismiss this appeal with costs.

Young, J.—I concur.

Civil 1st Appeal No. 159 of 1910.

September 10th, 1912.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

P. K. A. C. T. CHOCKALINGAM CHETTY, BY HIS AGENT THENNAPPA CHETTY. *v.* 1. YAUNGNI. 2. HLA DIN. 3. SAW YU. MINORS, HEIRS AND LEGAL REPRESENTATIVES OF PO THAW, DECEASED, BY THEIR GUARDIAN *AD LITEM* TUN E.

J. C. Bilimoria—for appellant (plaintiff).

S. S. Palker—for respondents (defendents).

Transfer of property—partition—validity of oral transfer—removal of attachment—validity of deeds of transfer registered subsequent thereto—section 53, Transfer of Property Act, 1882.

A sued B for recovery of a certain sum in respect of transactions in paddy. In persuance of the decree which he secured he attached certain lands which were the subject of the suit.

The children of B through their guardian objected to the attachment and had it removed on the ground that B had partitioned amongst them the joint property of himself and his deceased wife.

B did report this partition to the Revenue Surveyor prior to the transaction which was the subject of the suit having taken place: and after removal of the attachment executed a deed of transfer of the lands in favour of the children's guardian.

It was held that the transfers were *bonâ fide* and although oral were valid, and that the registered deeds did no more than possibly perfect the children's title and, being executed after the attachment had been removed, were valid.

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(8) 2 Chan Toon's L. C., 220. (9) 2 L. B. R., 85.

Gyannessa v. *Mobarakannessa*, (1897) I. L R. 25 Cal., 210 ; *Karalia Nanubhai Mahomedbhai* v. *Mansukhram Vakhatchand*, (1900) I. L. R. 24 Bom., 400 ; referred to.

Fox, C. *J.*—On the 2nd October 1908 the appellant instituted a suit in the District Court of Henzada against Maung Po Thaw amongst others for recovery of Rs. 17,657-12-0 in respect of certain transactions in paddy. The transaction with Maung Po Thaw was alleged to have occurred in or about *Wazo* 1217 B.E. which would correspond to August 1908. The appellant obtained a decree in the suit on the 31st July 1909. This decree was subsequently confirmed on appeal. The District Court's decree was transferred to the Bassein District Court for execution, and on the appellant's application the lands which were the subject of the suit from which the appeal arises were attached in execution.

An uncle of the minor respondents, who are the children of Maung Po Thaw by his deceased wife, applied on their behalf. And as their guardian for removal of the attachment on the ground that he was in possession of the attached property on their behalf. He set up that Maung Po Thaw had in 1908 partitioned the joint property of himself and his deceased wife in view of his proposing to marry another wife, and that the attached lands had under this partition been delivered over to him as guardian for Maung Po Thaws's children, and that he had been and was in possession of them as such guardian.

It was undoubtedly the case that on the 29th May 1908 Maung Po Thaw reported to the Revenue Surveyor that he had transferred the lands in dispute to his children, but no registered deed was executed at the time.

The children's uncle succeeded in getting the attachment removed. The order was passed on the 14th June 1910. Two days afterwards Maung Po Thaw executed a deed of transfer of the lands in favour of Maung Tun E as guardian of the children and on the 20th June he executed another such deed. On the 7th July 1910 the appellant brought the suit out of which the appeal arises for a declaration of the liability of the lands to attachment under his decree against Maung Po Thaw. The suit was dismissed. The chief grounds urged in appeal on behalf of the appellants were that the alleged partition was a sham, that there had been no valid transfer at the time when the property was attached, and that the subsequent registered deeds of transfer were void and of no effect. The principle embodied in section 53 of the Transfer of Property Act was relied on. There is no evidence in this case warranting a conclusion that the transfers by Maung Po Thaw in 1908 to his children of the lands as their share of inheritance was part of a scheme to defeat either Maung Po Thaw's creditors in general or any of his creditors in particular. It could not have been part of a scheme to defeat the appellant, for at the time the transaction on which Maung Po Thaw was subsequently held to be indebted to him had not even been entered into.

The transfers of Maung Po Thaw in pursuance of the partition of his and his late wife's joint property must be held to have been

1912.

P. K. A. C. T. CHOCKALINGAM CHETTY v. YAUNG NI.

bonâ fide, and although oral they were valid, because the Transfer of Property Act does not make a writing necessary in the case of a partition—*see Gyannessa* v. *Mobarakunnessa* (1). Before the deeds executed on the 16th and 20th June 1901, the children had a good title to the properties, and these were not Maung Po Thaw's and consequently the appellant could not obtain a declaration that they were liable to attachment in execution of his decree.

The deeds did no more than possibly perfect the children's title and, being executed after the attachment had been removed were valid—see *Karalia Nanubhai Mahomedbhai* v. *Mansukhram Vakhatchand* (2). I would dismiss the appeal with costs of respondents to be paid by the appellant.

Hartnoll, J.—I concur.

Criminal Miscellaneous Application No. 38 of 1912.

September 26th, 1912.

Before Sir Charles Fox, Chief Judge.

G. W. HENDERSON *v.* KING-EMPEROR.

Dawson—for applicant.

Government Advocate—for King-Emperor.

Bail—grant of bail in non-bailable cases—contradictory statements of an accused person—general rule applicable to Magistrates—High Court's absolute discretion—exceptional circumstances—sections 497, 498, Code of Criminal Procedure, 1898.

In deciding the question of granting bail to persons accused of non-bailable offences, Magistrates must follow the provision of section 497, Code of Criminal Procedure, 1898.

A High Court is not limited within the bonds of that section, but as the Legislature has placed the initial stage of dealing with crimes with Magistrate and has in effect enacted that such persons shall be detained in custody except when no reasonable grounds, in the opinion of the Magistrates dealing with the case exist for believing that the accused has committed the offence charged against him, a High Court is bound to follow the general law as a rule and not to depart from it except in very special circumstances

I understand that the accused was arrested by the police because the uttering of four forged currency notes (each for Rs. 1,000) was traced to him. He is charged with an offence punishable under either section 489B or section 489C of the Indian Penal Code. He was brought before a Magistrate and the police applied for a remand to complete their investigation. The accused applied to the District Magistrate to be released on bail pending the investigation and trial. The District Magistrate refused the application. The part of the Magistrate's order which mentions that the accused had made contradictory statements appear to me to have been unfortunate, as possibly tending to prejudice the accused in his defence when he come to be tried. It is still more unfortunate that statements as to the accused having made contradictory statements should have been published.

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(1) (1897) I. L. R., 25 Cal., 210.
(2) (1900) I. L. R., 24 Bom., 400.

The statements could only have been made to a police officer or officers, and the law is that no self-incriminating statements by an accused to a police officer, such as contradictory statements must tend to be, can be proved against an accused person at his trial.

On of the offences charged against the accused is non-bailable, consequently the District Magistrate was bound under section 497 of the Code of Criminal Procedure to refuse to release the accused on bail if there appeared to him to be reasonable grounds for believing that the accused had been guilty of the offence charged against him.

The other part of his order shows that the Magistrate considered in effect that the tracing of the four forged notes to the accused afforded reasonable ground for believing that he had been guilty of the non-bailable offence charged against him.

In my judgment the District Magistrate was justified in his conclusion and in refusing to release the accused on bail.

Certain dicta of Judges in England on the subject of releasing on bail have been referred to as showing the governing principles on the subject, but in this country any case in which the subject arises must be decided in Magistrate's Courts in accordance with what the Legislature has enacted in section 497 of the Code of Criminal Procedure until that section is altered by the Legislature. The section says nothing about taking into consideration the likelihood or unlikelihood of the accused person absconding, or any other matter except whether or not there are reasonable grounds for believing that the accused has been guilty of the offence charged against him.

It is no doubt the case that a High Court is not limited within these bounds, and that it has absolute discretion in the matter, but the Legislature having placed the initial stage of dealing with crimes with Magistrates, and having in effect enacted that persons accused of non-bailable offences shall be detained in custody except when there are, in the opinion of the Magistrate dealing with a case, no reasonable grounds for believing that the accused has committed the offence charged against him, a High Court, in my judgment, is bound to follow the general law as a rule, and not to depart from it except under very special circumstances, especially so in the initial stages of a case. I see no such circumstances in this case, and I dismiss the application.

Civil 1st Appeal No. 177 of 1910.

September 20th, 1912.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

RAM BULLAB RHIRKAWALA *v.* 1. BABU BICKRAJ., 2. BABU SAGAMULI- CARRYING ON BUSIP- NESS IN PARTNERSHIP UNDER THE NAME OF BICKRAJ SAGAMULL BY THEIR AGENT BABU DONGAMAL.

Giles—for appellant (plaintiff).

McDonnell—for respondents (defendants).

Negotiable Instruments—promissory notes—holder—right to sue—adjudicated insolvent—discharge—Official Assignee's right of interference—insolvent's right of maintaining trover.

An adjudicated insolvent who has not obtained either his personal or final discharge may, even if all his property existing and prospective has been vested in the Official Assignee, sue for monies which he alleges are due to him provided that the Official Assignee does not interfere.

A holder of a negotiable instrument at the time of the action brought, being the only person who is then entitled to receive its contents, is the only person who can sue on it.

Draylon v. *Dale*, (1823) 2 B. and C., 293 ; *Herbert* v. *Sayer*, (1844) 5 Q. B.R., 965 ; referred to.

Fox, C. J.—The plaintiff-appellant sued on two promissory notes in his favour said to have been executed in January 1906 which where payable twelve months after date. During the course of the case it appeared that the plaintiff had in 1901 been adjudicated an insolvent by this Court. The record of this Court shows that he was adjudicated on his own petition, and he filed a schedule of debts he owed jointly as a member of a firm; although he entered nothing in the schedule of separate liabilities and amounts due to him he stated he had then only Rs. 50 worth of separate property.

He obtained an *ad interim* protection order, and after that did nothing. Although required to appear before the Court he did not do so, and a warrant for his arrest was of no avail. He obtained neither his personal nor his final discharge.

The vesting order made in the case vested in the Official Assignee of this Court all his property which he had then and all the property which he might thereafter acquire. That order continued and was in force at the time he made the loans used on and at the time he brought the suit.

The District Judge held that the vesting order was a bar to his suing on the notes. The first question to consider is whether this was so. The plaintiff wished to change his case when his insolvency in 1901 was raised against him, but on the plaint he was suing for monies personally due to him on promissory notes purporting to be in his personal favour and on trainsactions which

took place about five years after his adjudication and the vesting order. Assuming that he stated that the monies he lent had been acquired by him subsequent to the insolvency, then according to the law of Bankruptcy as administered in England, the previous vesting order would have been no bar to his recovering any monies due on the notes unless the Official Assignee interfered. The law is most clearly laid down in *Drayton* v. *Dale* (1) in the following words :—

> An uncertificated bankrupt has a right to goods acquired by him since his bankruptcy against all the world but his assignees (corresponding to the Official Assignee in this country), and he may maintain trover for them against a stranger. It is clear, therefore, that bankrupt has a property in such goods. The assignees have vested in them a right to interfere and claim the property ; and if they do make any claim, it is effectual against the bankrupt and all the world ; but if they do not interfere, then, as between the bankrupt and his debtor, the latter cannot set up their title ; but the bankrupt has a right, in a Court of law, to enforce the payment of his debt.

This statement of the law was re-affirmed by Tindal, C. J., in *Herbert* v. *Sayer* (2) in the Exchequer Chamber and according ta Byles on Bills at page 407 of the 17th Edition, it is still the law.

In the present case the Official Assignee had not interfered and claimed the monies due on the notes ; consequently it was not open to the defendants under the law as stated above to raise the plea that the plaintiff had no right of suit on the notes. Possibly owing to his being met with the above plea the plaintiff set up at a late stage that the debts for which the notes were given were really debts owing to the plaintiff's wife, and that the plaintiff in bringing the suit was only acting as trustee for his wife. The District Judge held that on such a case the plaintiff could not succeed unless the plaint was amended so as to show (presumably) that the plaintiff was suing as a trustee, and the learned Judge considered that the case was not one in which amendment should be allowed.

Under the law of Negotiable Instruments the rule is that the holder of such an instrument at the time of action brought, *i.e.*, the person who is then entitled to receive its contants, is the only person who can then sue on it--*see* Byles on Bills, 17th Edition, page 359.

The plaintiff was the holder of the notes which were expressed to be in his favour personally, and he was the only person who could properly sue on them, the Official Assignee not having interfered or claimed on them.

In my opinion the decree dismissing the sust must be set aside, and the case must be sent back with directions that it be re-admitted under its original number and tried.

I would order that the costs of this appeal follow the ultimate decision of the suit.

Hartnoll, J.—I concur.

(1) (1823) 2 B. and C., 293.
(2) (1844) 5 Q.B.R., 965.

INDEX

TO

LOWER BURMA RULINGS, VOLUME VI,

1911-12.

A

INDEX

TO

LOWER BURMA RULINGS, VOLUME VI,

1911-12.

A

B

PAGE

C

COMPANY LAW—*rectification of register—transfers of shares—Articles of Association—powers of directors—lien—waiver—validity of transfer—reasons for refusal to transfer not to be arbitrary, capricious or wanton—s. 58, Indian Companies Act, 1882.*

A was the Managing Director of a Company to which he was indebted. He deposited a certain number of fully paid shares with a Bank with which he had dealings with intent to create an equitable mortgage. The Bank entered on the blank transfer deed the names of two of its officials who were registered by the company as the owners of the shares. Subsequently B bought a certain number of these shares; but when asked to register the transfer to B the company refused on the ground that a lien which they claimed to possess under one of the Articles of Association upon A's shares had not been discharged.

Under section 58, Indian Companies Act, 1882, the officials of the Bank applied to the Court for a rectification of the Register (cross applications were also filed by the company and by a shareholder in the company).

After considering the terms of the Articles of the Association it was held that the transfer to the Bank was valid.

The transferees had complied with what was required of them and were entitled to assume that the company had acted in accordance with its internal regulations so far as sanctioning the transfer was concerned.

The company were aware of the first transfer shortly after it was effected but took no steps to rectify the register or to set up a claim that their lien upon the shares still existed under one of the Articles of Association. By registering the names of the Bank officials as owners of the shares the company were therefore estopped from denying that latter were (as transferors to B such) owners.

It was further held that the Court might consider the grounds advanced by the company for refusing to register B as an owner of the shares in place of the Bank officials when those grounds were disclosed. Inasmuch as the objection the company raised to the original transfer was an effort to avoid the consequences of a prior mistake made by them and to obtain a position which by their own act they had waived the reason given by them was regarded as arbitrary. The register was ordered to be rectified by the insertion of B's name.

In re Hoylake Railway Company, Ex-parte Littledale, L.R. (1874) 9 Ch., A.C., 257; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* L.R. (1895) 1 Ch. Dn., 629; *Balkis Consolidated Company Limited* v. *Fr. Tomkinson*, L.R. (1893) A.C., 306; *In re Gresham Life Assurance Society*, L.R. (1872) 8 Ch. A.C., 446, *Re Bell Brothers*, 7 L. Times R., 691 followed.

In ex-parte Sargent, L. R. (1873) 17 Enquiry, 273; referred to.

Norman Henry Matheson v. *The Nathsingh Oil Company, Limited* ... 152

———*registration of companies—certificate of incorporation conclusive—subsequent enquiry as to compliance by the Register of Companies with conditions of incorporation precluded—*res judicata*—ss, 6, 41, Indian Companies Act, 1882—s. 13, Explanation II, Civil Procedure Code, 1882.*

The validity of certain conveyances made by a Mahomedan were established in a suit; but the validity of the incorporation of a

PAGE

D

PAGE

A was convicted under sections 393 and 398, Indian Penal Code, of attempt at extortion amounting to robbery on the facts that he threatened to cut B and C with a *dah* which he brandished unless they gave him money. He pleaded drunkenness in defence.

The question of how far the drunkenness of an accused may be taken into consideration in connection with an alleged offence was considered.

Held,—that the drunkenness of an accused person at the time he committed the act, charged as an offence, may be and should be taken into consideration in cases where intention on the part of the accused is necessary to constitute the offence charged, and that the intention which would be ascribed to a sober man in connection with an act must not necessarily be ascribed to a drunken man who does the same act. The question of intention must be determined in each individual case according to the actual facts proved according to accepted principles.

The omission of any express provision, in section 86 of the Indian Penal Code, regarding the intention which is to be attributed to a drunken man doing an act which is an offence when done with a particular knowledge or intent leaves it open to the Courts to deal with the question of intention on the general principles of law.

In the case of A, it was decided that he was not at the time he committed the alleged offence intoxicated to such a degree that he did not know what he was doing, or that he did not intentionally act as he did, or that indulging in the conduct he did he did not intend to cause wrongful loss to B and wrongful gain to himself. As however reasonable doubt existed as to whether the conditions necessary to consitute the offence an attempt at robbery were fulfilled, the conviction was altered to one under section 387, Indian Penal Code.

Crown v. *Tha Sin*, (1902) 1 L.B.R., 216 ; *King* v. *Meader* (1909) L.R. 1 K.B.D. 895 ; *J. M.* v. *King-Emperor*, U.B.R. 1910. 2nd Quarter, 17 ; *Reg.* v. *Doherty*, (1887) 16 Cox's Cr. C., 306 ; referred to.

E

EQUITABLE MORTGAGE—*deposit of title deeds of property situated outside the towns mentioned in section 59, Transfer of Property Act, 1882.*

A valid equitable mortgage can be made in any of the towns mentioned in section 59 of the Transfer of Property Act by a deposit of title-deeds, although note of the property is situated within any of those towns.

Madho Das v. *Ram Kishen*, (1892) I.L.R. 14 All., 238 ; *Manckji Framji* v. *Rustomji Nvserwani Mistry*, (1889) I.L.R. 14 Bom., 269 ; *Srinath Roy* v. *Godahur Das*, (1897) I.L.R. 24 Cal,, 348 ; followed.

EVIDENCE—*unfavourable nature thereof of one witness—insufficient by itself to justify dismissal of a suit if othee witness can be produced.*

A sued B to recover a certain sum of money in consequence of breach of contract. After the framing of issues the evidence of one of A's witnesses was taken on one of the issues and this evidence was unfavourable to A. Despite A's wish to adduce further evidence on this issue, the suit was dismissed.

F

M

P

S

T

U

V

W

G.U.B C.P.O.—No. 18 H.C.R., 17-6-53—300—VIII.